



DIVISION OF  
CORPORATION FINANCE

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

February 8, 2022

Marc S. Gerber  
Skadden, Arps, Slate, Meagher & Flom LLP

Re: Johnson & Johnson (the "Company")  
Incoming letter dated December 8, 2021

Dear Mr. Gerber:

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

The Proposal asks that the board commission and publish a report on (1) the public health costs created by the limited sharing of the Company's COVID-19 vaccine technologies and any consequent reduced availability in poorer nations and (2) the manner in which such costs may affect the market returns available to its diversified shareholders.

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

We are unable to concur in your view that the Company may exclude the Proposal under Rule 14a-8(i)(11). In our view, the Proposal does not substantially duplicate the proposal submitted by Oxfam America, Inc. et al.

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

Sincerely,

Rule 14a-8 Review Team

cc: Jeffrey E. Field  
Harrington Investments, Inc.

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP  
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**BY EMAIL** (shareholderproposals@sec.gov)

December 8, 2021

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 2022 Annual Meeting  
Omission of Shareholder Proposal of  
Jeffrey E. Field

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 Jeffrey E. Field (the "Proponent") from the proxy materials to be distributed by Johnson & Johnson in connection with its 2022 annual meeting of shareholders (the "2022 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 2022 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 it 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 contained in the Proposal is set forth below:

**RESOLVED**, shareholders ask that the Board of Directors commission and publish a report on (1) the public health costs created by the limited sharing of the Company's COVID-19 vaccine technologies and any consequent reduced availability in poorer nations and (2) the manner in which such costs may affect the market returns available to its diversified shareholders.

### **II. Bases for Exclusion**

We hereby respectfully request that the Staff concur with Johnson & Johnson's view that the Proposal may be excluded from the 2022 proxy materials pursuant to:

- Rule 14a-8(i)(7) because the Proposal deals with matters relating to Johnson & Johnson's ordinary business operations; and
- Rule 14a-8(i)(11) because the Proposal substantially duplicates a shareholder proposal previously submitted to Johnson & Johnson that Johnson & Johnson intends to include in its 2022 proxy materials in the event that the Staff does not concur with the exclusion of the previously submitted proposal from Johnson & Johnson's 2022 proxy materials.

### **III. Background**

On November 9, 2021, Johnson & Johnson received the Proposal, sent via email, accompanied by a cover letter from the Proponent dated November 9, 2021, and a letter from Charles Schwab, dated November 9, 2021, verifying the Proponent's continuous ownership of at least the requisite amount of stock for at

least the requisite period preceding and including the date of submission (the “Broker Letter”). Copies of the Proposal, cover letter, Broker Letter and related correspondence are attached hereto as Exhibit A.

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

Under Rule 14a-8(i)(7), a shareholder proposal may be excluded from a company’s proxy materials if the proposal “deals with matters relating to the company’s ordinary business operations.” In Exchange Act Release No. 34-40018 (May 21, 1998) (the “1998 Release”), the Commission stated that the policy underlying the ordinary business exclusion rests on two central considerations. The first recognizes that certain tasks are so fundamental to management’s ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight. The second consideration relates to the degree to which the proposal seeks to “micro-manage” the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment.

The Commission has stated that a proposal requesting the dissemination of a report is excludable under Rule 14a-8(i)(7) if the substance of the proposal involves a matter of ordinary business of the company. *See* Exchange Act Release No. 34-20091 (Aug. 16, 1983) (“[T]he staff will consider whether the subject matter of the special report or the committee involves a matter of ordinary business; where it does, the proposal will be excludable under Rule 14a-8(c)(7).”); *see also Netflix, Inc.* (Mar. 14, 2016) (permitting exclusion under Rule 14a-8(i)(7) of a proposal that requested a report describing how company management identifies, analyzes and oversees reputational risks related to offensive and inaccurate portrayals of Native Americans, American Indians and other indigenous peoples, how it mitigates these risks and how the company incorporates these risk assessment results into company policies and decision-making, noting that the proposal related to the ordinary business matter of the “nature, presentation and content of programming and film production”).

In accordance with the policy considerations underlying the ordinary business exclusion, the Staff has consistently permitted exclusion under Rule 14a-8(i)(7) of shareholder proposals relating to the products and services offered for sale by a company and the methods of distribution of those products and services. *See, e.g., Verizon Communications Inc.* (Jan. 29, 2019) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting that the company offer its shareholders the same discounts on its products and services that are available to its employees,

noting that the proposal “relates to the [c]ompany’s ‘discount pricing policies’”); *Pfizer Inc.* (Mar. 1, 2016) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting a report describing the steps the company has taken to prevent the sale of its medicines to prisons for the purpose of aiding executions, noting that the proposal “relates to the sale or distribution of [the company’s] products”); *The Walt Disney Co.* (Nov. 23, 2015) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting that the company’s board of directors approve the release of a specific film on Blu-ray, noting that the proposal “relates to the products and services offered for sale by the company”); *Equity LifeStyle Properties, Inc.* (Feb. 6, 2013) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting a report on, among other things, “the reputational risks associated with the setting of unfair, inequitable and excessive rent increases that cause undue hardship to older homeowners on fixed incomes” and “potential negative feedback stated directly to potential customers from current residents,” noting that the “setting of prices for products and services is fundamental to management’s ability to run a company on a day-to-day basis”); *JPMorgan Chase & Co.* (Mar. 16, 2010) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting that the board implement a policy mandating that the company cease its current practice of issuing refund anticipation loans, noting that the proposal “relate[s] to [the company’s] decision to issue refund anticipation loans” and that “[p]roposals concerning the sale of particular services are generally excludable under rule 14a-8(i)(7)”).

More specifically, under those same policy considerations underlying the ordinary business exclusion, the Staff has recognized that decisions regarding whether, how and when to license a company’s technologies are fundamental to a company’s day-to-day operations and cannot, as a practical matter, be subject to direct shareholder oversight. In *International Business Machines Corporation* (Jan. 22, 2009), for example, the proposal requested that the company take steps to further the advancement of open source software, which the company noted allows recipients to “freely copy, modify and distribute the program source code without paying a royalty fee.” In permitting exclusion under Rule 14a-8(i)(7), the Staff noted that the proposal related to the company’s “ordinary business (i.e., the design, development and licensing of [the company’s] software products).”

Moreover, the Staff has reiterated this view even when proponents have raised questions concerning a company’s approach to protecting its intellectual property in light of global pandemics. For example, in *Abbott Laboratories* (Mar. 9, 2006), the Staff permitted exclusion as relating to ordinary business under Rule 14a-8(i)(7) of a proposal requesting a review of the economic effects of the HIV/AIDS, tuberculosis and malaria pandemics on the company’s business strategies and initiatives, where the proponents described intellectual property

protections as “at odds with combatting HIV/AIDS and other diseases.” *See also Pfizer Inc.* (Jan. 24, 2006) (same); *Marathon Oil Corp.* (Jan. 23, 2006) (same).

In addition, the Staff has permitted exclusion under Rule 14a-8(i)(7) of proposals requesting a report on the impact of a company’s actions on overall market returns. *See, e.g., JPMorgan Chase & Co.* (Mar. 26, 2021) (permitting exclusion under Rule 14a-8(i)(7) of a proposal requesting the board report on the external costs created by the company underwriting multi-class equity offerings and the manner in which such costs affect the majority of its shareholders who rely on overall stock market return, noting that the proposal “does not transcend the [c]ompany’s ordinary business operations”); *The Goldman Sachs Group, Inc.* (Mar. 9, 2021, *recon. denied* Mar. 19, 2021) (same).

In this instance, the Proposal focuses primarily on decisions concerning how Johnson & Johnson chooses to sell its products, decisions concerning whether, when and how Johnson & Johnson chooses to license its technologies and decisions concerning how Johnson & Johnson chooses to safeguard its intellectual property, all of which are quintessential ordinary business matters. Moreover, the Proposal’s call for a review on the impact of these decisions on overall market returns to investors that may be “diversified” does not transform these matters from ordinary business matters, because the economic effect of such decisions is itself ordinary business.

The Proposal’s focus on these ordinary business matters is manifest. In particular, the Proposal’s resolved clause requests a report on the costs created by “limited sharing of [Johnson & Johnson’s] COVID-19 vaccine technologies and any consequent reduced availability in poorer nations” and the “manner in which such costs may affect [] market returns available to diversified shareholders.” In addition, the Proposal’s supporting statement asserts that Johnson & Johnson’s “enforcement of patents and limitations on technology transfer” has resulted in an imbalance between rich and poor nations with regard to COVID-19 vaccination rates and “prevent[ed] vaccine production in poorer nations,” thereby causing a “severe cost to the global economy” and “inhibiting worldwide economic recovery.” The supporting statement goes on to say that such global imbalances ultimately harm Johnson & Johnson’s shareholders, “who are diversified and thus rely on broad economic growth to achieve their financial objectives.” When read together, the Proposal’s resolved clause and supporting statement emphasize the Proposal’s focus on particular decisions made by Johnson & Johnson regarding the sale and distribution of its products, decisions about licensing its technology and safeguarding its intellectual property, and the overall economic effect of those decisions to “diversified” shareholders.

The Proposal's concern with Johnson & Johnson's decisions about whether and how to share its product technologies and how to safeguard its intellectual property and the economic effect of those determinations clearly demonstrates that the Proposal is focused on Johnson & Johnson's ordinary business matters. Decisions with respect to the manner and markets in which a company sells or licenses its products and technologies, and how a company protects its intellectual property, are at the heart of Johnson & Johnson's business as a global healthcare company and are so fundamental to Johnson & Johnson's day-to-day operations that they cannot, as a practical matter, be subject to direct shareholder oversight. Moreover, calling for a review of the overall economic effect of those decisions on "diversified" investors does not change the fact that these matters are precisely the types of core business functions that the Staff has long recognized are not appropriate for direct shareholder oversight. Therefore, the Proposal may be excluded under Rule 14a-8(i)(7) as relating to Johnson & Johnson's ordinary business operations.

We note that a proposal may not be excluded under Rule 14a-8(i)(7) if it is determined to focus on a significant policy issue. The fact that a proposal may touch upon a significant policy issue, however, does not preclude exclusion under Rule 14a-8(i)(7). Instead, the question is whether the proposal focuses primarily on a matter of broad public policy versus matters related to the company's ordinary business operations. *See* 1998 Release; Staff Legal Bulletin No. 14E (Oct. 27, 2009). The Staff has consistently permitted exclusion of shareholder proposals where the proposal focused on ordinary business matters, even though it also related to a potential significant policy issue. For example, in *PetSmart, Inc.* (Mar. 24, 2011), the proposal requested that the company's board require suppliers to certify that they had not violated certain laws regulating the treatment of animals. Those laws affected a wide array of matters dealing with the company's ordinary business operations beyond the humane treatment of animals, which the Staff has recognized as a significant policy issue. In permitting exclusion under Rule 14a-8(i)(7), the Staff noted the company's view that "the scope of the laws covered by the proposal is 'fairly broad in nature from serious violations such as animal abuse to violations of administrative matters such as record keeping.'" *See also, e.g., CIGNA Corp.* (Feb. 23, 2011) (permitting exclusion under Rule 14a-8(i)(7) when, although the proposal addressed the potential significant policy issue of access to affordable health care, it also asked CIGNA to report on expense management, an ordinary business matter); *Capital One Financial Corp.* (Feb. 3, 2005) (permitting exclusion under Rule 14a-8(i)(7) when, although the proposal addressed the significant policy issue of outsourcing, it also asked the company to disclose information about how it manages its workforce, an ordinary business matter).

In this instance, even if the Proposal were to touch on a potential significant policy issue, the Proposal's overwhelming concern with the methods by which products and services are offered for sale by Johnson & Johnson, the decisions made concerning whether, when and how to license technology and safeguard intellectual property and the effects of those decisions on "diversified" investors demonstrates that the Proposal's focus is on ordinary business matters. In particular, the Proposal's supporting statement demonstrates this focus by overwhelmingly discussing the economic effects of Johnson & Johnson's product and licensing decisions. Therefore, even if the Proposal could be viewed as touching upon a significant policy issue, its focus is on ordinary business matters.

Accordingly, the Proposal should be excluded from Johnson & Johnson's 2022 proxy materials pursuant to Rule 14a-8(i)(7) as relating to Johnson & Johnson's ordinary business operations.

**V. The Proposal May be Excluded Pursuant to Rule 14a-8(i)(11) Because the Proposal Substantially Duplicates Another Proposal Previously Submitted to Johnson & Johnson.**

Under Rule 14a-8(i)(11), a company may exclude a shareholder proposal if it substantially duplicates another proposal previously submitted to the company by another proponent that will be included in the company's proxy materials for the same meeting. The Commission has stated that the purpose of Rule 14a-8(i)(11) is to eliminate the possibility of shareholders having to consider two or more substantially identical proposals submitted by proponents acting independently of each other. *See* Securities Exchange Act Release No. 34-12598 (July 7, 1976).

Two shareholder proposals need not be identical in order to provide a basis for exclusion under Rule 14a-8(i)(11). Proposals are substantially duplicative when the principal thrust or focus is substantially the same, even though the proposals differ in terms of the breadth and scope of the subject matter. In *Duke Energy Corp.* (Feb. 19, 2016), for example, the Staff granted the company's request to exclude a proposal asking the board to initiate a review of the organizations of which the company was a member or otherwise supported that may engage in lobbying activities and to provide a related report to shareholders. In that proposal, the supporting statement described the benefits received by the company from limited government and relationships with pro-growth groups. In its no-action request, the company explained that the proposal shared the same principal thrust or focus as a previously-submitted proposal requesting a report on the company's direct and indirect lobbying activities, including grassroots lobbying activities, even though, unlike the other supporting statement, the previously-submitted proposal's supporting statement described the need for transparency and accountability

concerning the company's role in influencing legislation and the use of corporate funds for lobbying activities. *See also, e.g., Exxon Mobil Corp.* (Mar. 13, 2020) (proposal requesting a report on how the company's lobbying activities align with the Paris Climate Agreement's goal may be excluded under Rule 14a-8(i)(11) because the proposal shared the same principal thrust or focus as a previously-submitted proposal seeking disclosure of lobbying expenditures that was broader in scope); *Danaher Corp.* (Jan. 19, 2017) (proposal to adopt goals for reducing greenhouse gas emissions, with a supporting statement describing four different reasons to do so, including a moral obligation, may be excluded under Rule 14a-8(i)(11) because the proposal shared the same principal thrust or focus as a previously-submitted proposal with a supporting statement describing the risks and opportunities provided by climate change); *Pfizer Inc.* (Feb. 17, 2012) (proposal requesting a lobbying priorities report, with a supporting statement describing the company's role in the passage of "ObamaCare," may be excluded under Rule 14a-8(i)(11) because the proposal shared the same principal thrust or focus as a previously-submitted proposal with a supporting statement calling for greater transparency of the company's lobbying expenditures).

Johnson & Johnson received a proposal (the "Prior Proposal") from Oxfam America, Inc. and co-filers on November 4, 2021. A copy of the Prior Proposal is attached hereto as Exhibit B. Johnson & Johnson believes that the Proposal substantially duplicates the Prior Proposal and, as such, the Proposal may be excluded pursuant to Rule 14a-8(i)(11).

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

RESOLVED that shareholders of Johnson & Johnson ("JNJ") ask the Board of Directors to report to shareholders, at reasonable expense and omitting confidential and proprietary information, on whether and how JNJ subsidiary Janssen's receipt of government financial support for development and manufacture of vaccines and therapeutics for COVID-19 is being, or will be, taken into account when engaging in conduct that affects access to such products, such as setting prices.

The principal thrust and focus of the Proposal and the Prior Proposal are the same—an assessment of Johnson & Johnson's decision-making with regard to COVID-19 vaccine access. Specifically, the Proposal asks Johnson & Johnson to report on "costs created by the limited sharing of [Johnson & Johnson's] COVID-19 vaccine technologies and any consequent reduced availability in poorer nations." Likewise, the Prior Proposal asks Johnson & Johnson to report on how Johnson & Johnson's purported receipt of government financial support for vaccine

development and manufacture is taken into account when making decisions “that affects access to [COVID-19] products.”

In addition, the supporting statement of each proposal demonstrates the proposals’ shared focus on Johnson & Johnson’s approach to COVID-19 vaccine access. The Proposal’s supporting statement states that “many countries struggle to obtain vaccines” and asserts that “vaccine inequality is caused in part by the enforcement of patents and limitations on technology transfer” and that Johnson & Johnson is “increasing its own financial returns by preventing vaccine production in poorer countries.” Similarly, the Prior Proposal’s supporting statement asserts that “[s]caling up production of low-cost vaccine is critical to ensuring universal access, which can ... reignite the global economy, and boost investor returns,” noting that “high-income countries have administered 134 doses per 100 residents, while low-income countries have administered only 4 doses per 100 residents.” The Prior Proposal also asserts that Johnson & Johnson “faces enormous pressure to share intellectual property associated with the vaccines.”

Although the breadth and scope of the Proposal and the Prior Proposal, as well as their respective supporting statements, may differ, with one emphasizing how Johnson & Johnson’s purported receipt of public funding may affect its decisions on vaccine access and the other emphasizing the need to report on the costs created by Johnson & Johnson’s decisions with regard to the sharing of its COVID-19 vaccine technologies, the Proposal and the Prior Proposal share the same thrust and focus an assessment of Johnson & Johnson’s approach to COVID-19 vaccine access. Therefore, the inclusion of both proposals in Johnson & Johnson’s 2022 proxy materials would be duplicative and would frustrate the policy concerns underlying the adoption of Rule 14a-8(i)(11).

Accordingly, because the Proposal substantially duplicates the Prior Proposal, which was previously submitted to Johnson & Johnson and will be included in the 2022 proxy materials, the Proposal may be excluded pursuant to Rule 14a-8(i)(11) in the event that the Staff does not concur with the exclusion of the Prior Proposal from Johnson & Johnson’s 2022 proxy materials.

## **VI. Conclusion**

Based upon the foregoing analysis, we respectfully request that the Staff concur that it will take no action if Johnson & Johnson excludes the Proposal from its 2022 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

Enclosures

cc: Matthew Orlando  
Worldwide Vice President, Corporate Governance and Corporate Secretary  
Johnson & Johnson

Jeffrey E. Field  
Harrington Investments, Inc.

John Harrington  
Harrington Investments, Inc.

Brianna Harrington  
Harrington Investments, Inc.

Sara Murphy  
Harrington Investments, Inc.

Frederick Alexander  
Harrington Investments, Inc.

EXHIBIT A

(see attached)



November 9, 2021

Johnson & Johnson  
Office of the Corporate Secretary  
One Johnson & Johnson Plaza  
New Brunswick, New Jersey 08933

**RE: Shareholder Proposal**

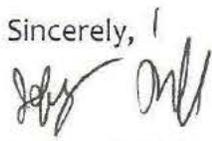
Dear Corporate Secretary:

I, Jeffrey E. Field, am filing the enclosed shareholder proposal at the Johnson & Johnson Company for inclusion in the 2022 proxy statement, in accordance with Rule 14a-8 of the General Rules and Regulations of the Securities Exchange Act of 1934.

I have been a shareholder continuously for over 3 years, since and including November 9, 2018, holding at least \$2,000 in market value and will continue to invest in at least the requisite number of shares for proxy resolutions through the annual shareholders' meeting. The verification of ownership by our custodian, a DTC participant, will be sent separately. I, or a representative, will attend the Annual Meeting to present the resolution.

We look forward to having productive conversations with the company. Per SEC requirements, I am available to meet with the company via teleconference on November 22<sup>nd</sup> or November 23<sup>rd</sup> between 9am and 11am PST respectively. Please direct all future correspondence regarding this proposal to the contact information below.

Please copy my colleagues John Harrington, Brianna Harrington, Sara Murphy and Frederick Alexander on all correspondence.

Sincerely,  
  
Jeffrey E. Field

CC: [john@harringtoninvestments.com](mailto:john@harringtoninvestments.com)  
[brianna@harringtoninvestments.com](mailto:brianna@harringtoninvestments.com)  
[sara@theshareholdercommons.com](mailto:sara@theshareholdercommons.com)  
[rick@theshareholdercommons.com](mailto:rick@theshareholdercommons.com)



[Johnson & Johnson: Rule 14a 8 Proposal, November \_\_, 2021]

[This line and any line above it – Not for publication.]

ITEM 4\*: Report on public health cost of protecting vaccine technology

**RESOLVED**, shareholders ask that the Board of Directors commission and publish a report on (1) the public health costs created by the limited sharing of the Company's COVID 19 vaccine technologies and any consequent reduced availability in poorer nations and (2) the manner in which such costs may affect the market returns available to its diversified shareholders.

#### **Supporting Statement:**

A recent headline emphasizes the financial rewards accruing to the Company for being an early developer of a COVID 19 vaccine: "Johnson & Johnson Stock Gains as Vaccine Sales Boost Q3 Earnings, 2021 Forecasts."

But while the Company is boosting earnings with vaccine sales, many countries struggle to obtain vaccines for their most susceptible communities. The imbalance in COVID 19 vaccination between rich and poor countries is striking: As of early September 2021, more than 50 percent of U.S. and European Union populations were fully vaccinated, compared with just 3 percent of Africa's population.<sup>2</sup>

This vaccine inequality is caused in part by the enforcement of patents and limitations on technology transfer designed to prevent competition.<sup>3</sup> Civil society and government leaders—including U.S. President Biden—have called for waivers of intellectual property rights to vaccine technology. Human rights organization Oxfam has called for governments and corporations to suspend patent rules and openly share technology.<sup>4</sup> Some argue that such moves would disincentivize investment and lead to low quality vaccines, but others have exposed the weaknesses in these arguments.<sup>5</sup> The Company has not been neutral in this debate; it supports a trade group that lobbies against patent waivers.<sup>6</sup>

To the extent our Company is increasing its own financial returns by preventing vaccine production in poorer nations, its own increased profits are coming at a severe cost to the global economy, because failure to vaccinate the world's vulnerable communities is inhibiting worldwide economic recovery and creating opportunities for more dangerous SARS CoV 2 variants to develop.

This is a bad trade for most of the Company's shareholders, who are diversified and thus rely on broad economic growth to achieve their financial objectives. A Company strategy that increases its own financial returns but threatens global GDP is counter to the best interests of most of its shareholders: the

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<sup>1</sup> <https://www.thestreet.com/markets/ohnson-ohnson-stock-gains-as-vaccine-sales-boost-q3-earnings>

<sup>2</sup> <https://www.cnn.com/2021/09/07/who-says-wealthy-nations-are-prolonging-pandemic-by-hoarding-covid-treatments-and-vaccines.html> (citing World Health Organization).

<sup>3</sup> *Supra*, n.2.

<sup>4</sup> <https://www.oxfam.org/en/take-action/campaigns/covid-19-vaccine>

<sup>5</sup> <https://inthesetimes.com/article/pfizer-moderna-vaccine-apartheid-trips-waiver-wto-intellectual-property-patents>

<sup>6</sup> <https://www.msn.com/en-us/news/other/big-pharma-lobbyists-launch-campaign-against-biden-over-covid-vaccine-patent-waiver/ar-AAKBxDs>

potential drag on GDP created by hoarding vaccine technology will directly reduce diversified portfolio returns over the long term.<sup>7</sup>

Despite this risk, the Company has not disclosed any analysis of the trade offs between Company profit and global public health from the perspective of its largely diversified shareholders, whose investment portfolios may be at grave risk from undue limitations on vaccine production.

The requested report will help shareholders determine whether current Company policies serve shareholders' best interests.

Please vote for: Report on public health cost of protecting vaccine technology – Proposal [4\*]

[This line and any below are *not* for publication]

Number 4\* to be assigned by the Company

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<sup>7</sup> [https://www.unepfi.org/fileadmin/documents/universal\\_ownership\\_full.pdf](https://www.unepfi.org/fileadmin/documents/universal_ownership_full.pdf)



November 09, 2021

Account #: [REDACTED] PII  
Reference #: AM11218656  
Questions: Please call Schwab Alliance™ at  
1-800-515-2157

Jeffrey Field

[REDACTED] PII

US

Johnson & Johnson

Attention: Corporate Secretary

Office of the Corporate Secretary

One Johnson & Johnson Plaza

New Brunswick, New Jersey 08933

Re: Shareholder Proposal

Dear Corporate Secretary:

I write concerning a shareholder proposal (the "Proposal") submitted to the Johnson & Johnson Company by Jeffrey E. Field.

As of November 9th, 2021, Jeffrey E. Field beneficially owned, and had beneficially owned continuously for at least three years, shares of the Company's common stock (JNJ) worth at least \$2,000 (the "Shares").

Charles Schwab has acted as record holder of the Shares and is a DTC participant. If you require any additional information, please do not hesitate to contact me at 855-943-6159

Sincerely,

Sean Bothwell  
Sr Specialist, Institutional  
[Sean.Bothwell@schwab.com](mailto:Sean.Bothwell@schwab.com)

8040 South 48th Street  
Phoenix, AZ 85044

Independent investment advisors are not owned by, affiliated with, or supervised by Charles Schwab & Co., Inc. ("Schwab").

Schwab Advisor Services serves independent investment advisors and includes the custody, trading, and support services of Schwab.

EXHIBIT B

(see attached)

**From:** Robert Silverman <[Robert.Silverman@Oxfam.org](mailto:Robert.Silverman@Oxfam.org)>  
**Sent:** Thursday, November 4, 2021 8:34 AM  
**To:** Orlando, Matthew [JJCUS] <[Morland3@ITS.JNJ.COM](mailto:Morland3@ITS.JNJ.COM)>; Larkins, Marc [JJCUS] <[mlarkins@ITS.JNJ.com](mailto:mlarkins@ITS.JNJ.com)>  
**Cc:** Rohit Malpani [REDACTED] PII  
**Subject:** [EXTERNAL] Oxfam shareholder resolution

Dear Matt and Marc,

I want to thank you and your colleagues for a productive dialogue during yesterday's ICCR discussion. We look forward to continuing the conversation.

Attached please find Oxfam America's cover letter and shareholder proposal for JNJ's 2022 proxy ballot. We are sending a hard copy, as well, via overnight mail.

Please reach out to us with any questions, and we ask that you please confirm receipt.

Thank you,  
Robbie

**ROBERT K. SILVERMAN** | Senior Advocacy Manager, Private Sector Department  
Gender Pronouns: He/Him/His  
Oxfam America | Boston | M: (617) 780 7502  
[www.oxfamamerica.org](http://www.oxfamamerica.org) | [facebook.com/oxfamamerica](https://facebook.com/oxfamamerica) | [twitter.com/oxfamamerica](https://twitter.com/oxfamamerica)

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November 4, 2021

**BY EMAIL AND OVERNIGHT DELIVERY**

Johnson & Johnson, Inc.  
Attn: Assistant General Counsel and Corporate Secretary, Mr. Matt Orlando  
1 Johnson & Johnson Plaza  
New Brunswick, NJ 08933  
Email: MORland3@ITS.JNJ.COM

Re: Shareholder proposal for 2022 Annual Shareholder Meeting

Dear Mr. Orlando,

Enclosed please find a proposal of Oxfam America, Inc. (“Oxfam America”) and other co-filers to be included in the proxy statement of Johnson & Johnson, Inc. (the “Company”) for its 2022 annual meeting of shareholders.

Oxfam America has continuously held, for at least three years as of the date hereof, at least \$2,000 worth of the Company’s common stock. Verification of this ownership will be forthcoming. Oxfam America intends to continue to hold such shares through the date of the Company’s 2022 annual meeting of shareholders.

Oxfam America is the lead filer for this proposal and may be joined by other shareholders as co-filers. Oxfam America as lead filer is authorized to engage with the company and negotiate on behalf of each co-filer any potential withdrawal of this proposal.

Oxfam America welcomes the opportunity to discuss this proposal with representatives of the Company. We are available on **Thursday, November 18 between 1 and 3pm ET; Monday, November 22 between 10 am and 12pm ET; and Tuesday, November 23 between 3 and 5pm ET**. I can be contacted on (617) 780-7502 or by email at [robert.silverman@oxfam.org](mailto:robert.silverman@oxfam.org) to schedule a meeting. Please feel free to contact me with any questions.

Sincerely,

A rectangular area containing a handwritten signature in black ink, which appears to read "Robert Silverman".

Robert Silverman  
Oxfam America

[Enclosure]

## **SHAREHOLDER PROPOSAL REGARDING GOVERNMENT FINANCIAL SUPPORT AND ACCESS TO COVID-19 VACCINES AND THERAPEUTICS**

RESOLVED that shareholders of Johnson & Johnson (“JNJ”) ask the Board of Directors to report to shareholders, at reasonable expense and omitting confidential and proprietary information, on whether and how JNJ subsidiary Janssen’s receipt of government financial support for development and manufacture of vaccines and therapeutics for COVID-19 is being, or will be, taken into account when engaging in conduct that affects access to such products, such as setting prices.

### SUPPORTING STATEMENT

Janssen has received substantial government funding for COVID-19 related research and development. In February 2020, Janssen entered into a “collaborative partnership” with U.S. Biomedical Advanced Research and Development Authority (“BARDA”), receiving \$456 million in federal funding to develop a COVID-19 vaccine.<sup>1</sup> BARDA provided \$152 million for Janssen and a partner to develop therapeutics.<sup>2</sup> BARDA committed \$1 billion more in August 2020 to expand Janssen’s vaccine manufacturing capability.<sup>3</sup> In November 2020 BARDA committed an additional \$454 million to finance Phase III vaccine trials.<sup>4</sup>

JNJ has been distributing its COVID-19 vaccine on a “nonprofit” basis, but that commitment is limited to “emergency pandemic use.”<sup>5</sup> CFO Joseph Wolk predicted that nonprofit pricing would conclude by the end of 2021.<sup>6</sup>

JNJ has not clarified what “nonprofit” means when the government funds a significant portion of the research and development cost. If COVID-19 vaccines must be readministered regularly, as many experts predict,<sup>7</sup> demand will outlast the pandemic. The potential market will be vast.

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<sup>1</sup> <https://www.jnj.com/johnson-johnson-announces-collaboration-with-u-s-department-of-health-human-services-to-accelerate-development-of-a-potential-novel-coronavirus-vaccine>.

<sup>2</sup> <https://www.reuters.com/article/health-coronavirus-usa-funding/factbox-u-s-pours-billions-into-development-of-coronavirus-vaccines-tests-idINL4N2D32T5>.

<sup>3</sup> <https://www.hhs.gov/about/news/2020/08/05/hhs-dod-collaborate-with-johnson-and-johnson-to-produce-millions-of-covid-19-investigational-vaccine-doses.html>.

<sup>4</sup> <https://www.prnewswire.com/news-releases/johnson--johnson-and-us-department-of-health--human-services-expand-agreement-to-support-next-phase-of-covid-19-vaccine-candidate-research-and-development-301173112.html>.

<sup>5</sup> <https://www.jnj.com/johnson-johnson-covid-19-vaccine-authorized-by-u-s-fda-for-emergency-use-first-single-shot-vaccine-in-fight-against-global-pandemic>.

<sup>6</sup> <https://www.bloomberg.com/news/videos/2021-07-21/j-j-cfo-not-for-profit-vaccine-price-likely-to-end-in-2021-video>.

<sup>7</sup> E.g., <https://www.nature.com/articles/d41586-020-02278-5>.

Scaling up production of low-cost vaccine is critical to ensuring universal access, which can prevent domestic outbreaks,<sup>8</sup> reignite the global economy, and boost investor returns.<sup>9</sup> As of October 21, 2021, high-income countries have administered 134 doses per 100 residents, while low-income countries have administered only 4 doses per 100 residents.<sup>10</sup> Accordingly, JNJ faces enormous pressure to share intellectual property associated with the vaccines or therapeutics that public entities like BARDA fund. However, Janssen's agreements with BARDA have been criticized for limiting the government's intellectual property rights,<sup>11</sup> which could restrict mass production commensurate with global need – increasing price, decreasing supply and preventing universal access. The company has met only a fraction of its production goals – delivering about thirteen percent of promised doses,<sup>12</sup> missing significant profits as a result - which comes at the expense of the company's reputation, investors' returns, and those dying of COVID-19.

JNJ references tiered pricing espoused by the Gates Foundation as informing pricing, yet tiered pricing structures exclude low- and middle-income countries that cannot pay unaffordable prices. The company does not disclose how public financial support factors into its approach to ensuring access for its COVID-19 products. This Proposal asks JNJ to explain how the significant contribution from public entities affects its actions, including pricing, that impact access to COVID-19 products.

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<sup>8</sup> See

<https://www.americanprogress.org/issues/healthcare/reports/2020/07/28/488196/comprehensive-covid-19-vaccine-plan/>.

<sup>9</sup> <https://www.wsj.com/articles/covid-19-vaccine-deployment-would-give-global-economy-a-lift-next-year-11601820001>.

<sup>10</sup> <https://ourworldindata.org/covid-vaccinations> (last visited Oct. 22, 2021)

<https://www.keionline.org/wp-content/uploads/KEI-Briefing-OTA-29june2020.pdf>, at 4.

<sup>12</sup> Analysis of Airfinity data (29<sup>th</sup> October 2021).



**Frederick H. Alexander**

[info@theshareholdercommons.com](mailto:info@theshareholdercommons.com)

+1.302.485.0497

January 7, 2022

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

RE: *Shareholder proposal to Johnson & Johnson regarding effect of public health costs on diversified shareholders*

Division of Corporate Finance Staff Members:

Jeffrey E. Field (the “Proponent”) is beneficial owner of common stock of Johnson & Johnson (the “Company”) and has submitted a shareholder proposal (the “Proposal”) to the Company. The Proponent has asked me to respond to the letter dated December 8, 2021 (the “Company Letter”) that Marc Gerber (“Company Counsel”) sent to the Securities and Exchange Commission (the “SEC”). In that letter, the Company contends that the Proposal may be excluded from the Company’s 2022 proxy statement.

For the reasons discussed below, we respectfully submit that the Proposal must be included in the Company’s 2021 proxy materials and is not excludable under Rule 14a-8. The Proposal is attached as Appendix B to this letter. A copy of this letter is being emailed concurrently to Company Counsel.

**SUMMARY**

The Proposal requests a study of the public health costs associated with any reduced availability of COVID-19 vaccines in poorer nations resulting from the Company’s limited sharing of vaccine technology and consequent adverse effects on diversified shareholders. The Company asserts that the Proposal is excludable either as relating to ordinary business (Rule 14a-8(i)(7)) or because it is duplicative of a previously submitted proposal (Rule 14a-8(i)(11)).

The Proposal is not excludable pursuant to Rule 14a-8(i)(7) because it addresses a significant policy issue posed by the potential for Company business practices to improve its own financial performance in a manner that threatens global well-being and the intrinsic value of the economy upon which the Company’s diversified shareholders depend; recently, this widely discussed general policy question—

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whether companies should create financial return with practices that harm social and environmental systems—has been addressed specifically in the context of COVID-19 vaccines.

The Proposal is not excludable pursuant to Rule 14a-8(i)(11) because it requests a report that sheds light on a specific public policy issue: whether corporations should advance their financial interests even when it harms their diversified shareholders by degrading social and environmental systems. This issue was not addressed in the earlier-received proposal (the “Oxfam Proposal”), which requested a report on an entirely different policy question: how to account for government aid that went into the development of a commercial product sold by a for-profit entity. While both proposals involve COVID-19 vaccines, they ask for reports on different issues. There is no necessary relation between whether a company’s pricing accounts for government aid and whether technology-sharing practices threaten global well-being or the portfolios of diversified shareholders.

The Company’s own attempts to exclude both proposals under Rule 14a-8 bear this out, as the substantive bases for requesting exclusion of the two proposals are entirely different: the Company seeks to exclude the Proposal because it relates to ordinary business but makes no such argument with respect to the Oxfam Proposal. On the other hand, the Company has argued that the Oxfam Proposal should be excluded because it has been substantially implemented, an argument it does not proffer with respect to the Proposal.<sup>1</sup> If the proposals were in fact the same, it stands to reason that the Company would seek to exclude on the same bases.

## **ANALYSIS**

### **1. The Proposal is not excludable pursuant to Rule 14a-8(i)(7)**

#### *A. Staff guidance*

The Staff has indicated that a shareholder proposal that might otherwise be excludable as relating to ordinary business under Rule 14a-8(i)(7) may not be excludable if it raises significant social policy issues.<sup>2</sup> In explaining ordinary business, the Release noted:

*Certain tasks are so fundamental to management’s ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight. Examples include the management of the workforce, such as the hiring, promotion, and termination of employees, decisions on production quality and quantity, and the retention of suppliers. However, proposals relating to such matters but focusing on sufficiently significant social policy issues (e.g., significant discrimination matters) generally would not be considered to be excludable, because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.*

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<sup>1</sup> <https://www.sec.gov/divisions/corpfm/cf-noaction/14a-8/2021/oxfamjohnson120821-14a8-incoming.pdf>.

<sup>2</sup> Amendments to Rules on Shareholder Proposals, Exchange Act Release No. 34-40018 (May 21, 1998).

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*The determination as to whether a proposal deals with a matter relating to a company's ordinary business operations is made on a case-by-case basis, taking into account factors such as the nature of the proposal and the circumstances of the company to which it is directed.*

*Shareholder proposals involve significant social policies if they involve issues that engender widespread debate, media attention and legislative and regulatory initiatives.<sup>3</sup> The Staff recently announced its intention to refocus its analysis of the significant social policy exception on the policy in question, and not the nexus between the policy issue and the company. Shareholder Proposals: Staff Legal Bulletin No. 14L (CF):*

*Going forward, the staff will realign its approach for determining whether a proposal relates to "ordinary business" with the standard the Commission initially articulated in 1976, which provided an exception for certain proposals that raise significant social policy issues, and which the Commission subsequently reaffirmed in the 1998 Release. This exception is essential for preserving shareholders' right to bring important issues before other shareholders by means of the company's proxy statement, while also recognizing the board's authority over most day-to-day business matters. For these reasons, staff will no longer focus on determining the nexus between a policy issue and the company, but will instead focus on the social policy significance of the issue that is the subject of the shareholder proposal. In making this determination, the staff will consider whether the proposal raises issues with a broad societal impact, such that they transcend the ordinary business of the company.*

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

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<sup>3</sup> JD Supra, *SEC Staff's Latest Guidance Presents Dilemma for Companies Seeking to Exclude Shareholder Proposals on Environmental and Social Issues* (January 4, 2018) ("In a June 30, 2016 stakeholder meeting, the Staff indicated that significant policy issues are matters of widespread public debate, which include legislative and executive attention and press attention.")

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As we will discuss below, in the present matter, the report requested by the Proposal relates to an underlying significant policy issue, the question of whether companies should pursue profits in a manner that degrades critical environmental and social systems, with a focus on the Company's approach to guarding intellectual property involving COVID-19 vaccine technology.

*B. The specific significant policy issue: sharing the intellectual property behind the COVID-19 vaccines*

Pharmaceutical company conduct around COVID-19 vaccines is a highly contentious and contemporary public policy issue that transcends the Company's ordinary business and is therefore not excludable under Rule 14a-8(i)(7). Public discussion has made it clear that the question of whether companies should continue to exert their intellectual property rights relating to these vaccines even if doing so causes human and economic hardship is a significant policy issue on its own, as well as being part of the larger issue of when companies should continue to maximize their own returns at any cost.

The International Monetary Fund has estimated that the global economy could benefit by \$9 trillion over five years if the global response to COVID-19 were optimized.<sup>4</sup> Over the last year, a controversy has erupted around whether that response should include requiring companies to share the medical technology they have developed more broadly.

One aspect of this debate has been the call for companies to waive intellectual property rights they have under the Agreement on Trade-Related Aspects of Intellectual Property (TRIPS), a document administered by the World Trade Organization (WTO).<sup>5</sup> TRIPS requires countries (with limited exceptions) to enforce patents and copyrights so that, for example, India could not manufacture a vaccine for export without a license from a pharmaceutical company that held a relevant patent.

In 2020, India and South Africa called for a waiver of the relevant provisions of TRIPS for technology relating to COVID-19:

*9. There are several reports about intellectual property rights hindering or potentially hindering timely provisioning of affordable medical products to the patients. It is also reported that some WTO Members have carried out urgent legal amendments to their national patent laws to expedite the process of issuing compulsory/government use licenses.*

*10. Beyond patents, other intellectual property rights may also pose a barrier, with limited options to overcome those barriers. In addition, many countries especially developing countries may face institutional and legal difficulties when using flexibilities available in the Agreement on Trade-*

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<sup>4</sup> Ruchir Agarwal and Gita Gopinath, *A Proposal to End the COVID-19 Pandemic*, IMF Staff Discussion Note (May 2021), available at <https://www.imf.org/en/Publications/Staff-Discussion-Notes/Issues/2021/05/19/A-Proposal-to-End-the-COVID-19-Pandemic-460263>.

<sup>5</sup> See generally, Prabhash Ranjan, *The Case for Waiving Intellectual Property Protection for Covid-19 Vaccines*, Observer Research Foundation (April 6, 2021) available at <https://www.orfonline.org/research/the-case-for-waiving-intellectual-property-protection-for-covid-19-vaccines/>.

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*Related Aspects of Intellectual Property Rights (TRIPS Agreement). A particular concern for countries with insufficient or no manufacturing capacity are the requirements of Article 31bis and consequently the cumbersome and lengthy process for the import and export of pharmaceutical products.*

*11. Internationally, there is an urgent call for global solidarity, and the unhindered global sharing of technology and know-how in order that rapid responses for the handling of COVID-19 can be put in place on a real time basis.*

*12. In these exceptional circumstances, we request that the Council for TRIPS recommends, as early as possible, to the General Council a waiver from the implementation, application and enforcement of Sections 1, 4, 5, and 7 of Part II of the TRIPS Agreement in relation to prevention, containment or treatment of COVID-19.<sup>6</sup>*

This call has generated significant public controversy, with pharmaceutical companies (including the Company) objecting.<sup>7</sup> U.S. Senators have weighed in on both sides of the argument, with some claiming strict enforcement of intellectual property enhances drug development:

*Sen. Chris Coons (D.-Del.), said in Thursday's webinar that IP is "under both external and internal attack." But rather than being a barrier during the pandemic, Coons said everything he has seen indicates IP has been "a facilitator of critical cutting edge innovation."<sup>8</sup>*

In contrast, ten Senators wrote a letter to President Biden one week before the statement from Sen. Coons, urging support for the TRIPS waiver.<sup>9</sup> The Senators' letter made the case that the waiver was not simply an act of altruism that would save lives, but was necessary to revive the global economy:

*From a global public health perspective, this waiver is vital to ensuring sufficient volume of and equitable access to COVID19 vaccines and therapeutics around the world, which is why the waiver is supported by more than 100 nations. The TRIPS waiver is also essential to ensure all global economies, including the United States' economy, can recover from the pandemic and thrive. Simply put, we must make vaccines, testing, and treatments accessible everywhere if we are going to crush*

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<sup>6</sup> Waiver From Certain Provisions of the TRIPS Agreement For the Prevention, Containment and Treatment of Covid-19, Communication from India and South Africa, IP/C/W/669, 2 October 2020.

<sup>7</sup> Ian Lopez and Matthew Bultman, *Pfizer, J&J Balk at Calls to Loosen Grip on COVID Vaccine Rights*, Bloomberg Law (April 22, 2021) available at <https://news.bloomberglaw.com/health-law-and-business/pfizer-j-j-balk-at-calls-to-loosen-grip-on-covid-vaccine-rights>.

<sup>8</sup> *Id.*

<sup>9</sup> Letter available at <https://aboutblaw.com/W25>.

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*the virus anywhere. ...*

*Delaying vaccine deployment in the developing world to lock in profit  
boosting patent protections threatens the safety of the American public...*

*We need to make public policy choices, both in the U.S. and at the WTO  
that put lives first. This temporary, targeted TRIPS waiver is a critical tool  
in overcoming this once-in-a-lifetime pandemic; the benefits vastly  
outweigh the red herring arguments used by the pharmaceutical industry  
against the approval of this targeted, time-limited waiver.<sup>10</sup>*

On May 5, 2021, the Biden Administration announced its support for a TRIPS Waiver, adding the United States to the more than 100 nations referenced in the Senators' letter.<sup>11</sup> In contrast, the European Union has not opposed a broad waiver.<sup>12</sup>

Members of the pharmaceutical industry such as the Company are aware that this is an important public policy issue and have retained more than 100 lobbyists in their campaign to preserve intellectual property rights. Many observers believe this will harm the economy, even as it protects pharmaceutical industry profits.<sup>13</sup> Indeed, the Company's own lobbyists have entered the public debate on the matter:

*"The scarcity of vaccines is not because of intellectual property but  
because of regrettable production and distribution challenges," wrote  
Michelle McMurry-Heath, the president of the Biotechnology Innovation  
Organization, the trade group that represents Moderna, Pfizer, and  
Johnson & Johnson in an opinion column for The Economist.<sup>14</sup>*

Whether pharmaceutical companies such as the Company should use intellectual property to protect their own profits, even when such protection threatens the global health system and the global economy (thus threatening diversified portfolios), is the subject of a very real, very live public-policy debate at both national and international levels. This policy question transcends the ordinary business of the Company.

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<sup>10</sup> *Id.*

<sup>11</sup> *Statement from Ambassador Katherine Tai on the Covid-19 Trips Waiver*, Office of the United States Trade Representative (May 5, 2021) available at <https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/may/statement-ambassador-katherine-tai-covid-19-trips-waiver>.

<sup>12</sup> *See, e.g., The EU Proposed COVID Waivers of Certain TRIPS Rules Are Mostly Meaningless*, Medicines Law & Policy (October 14, 2021) available at <https://medicineslawandpolicy.org/2021/10/the-eu-proposed-covid-waivers-of-certain-trips-rules-are-mostly-meaningless/>.

<sup>13</sup> *Pharmaceutical Industry Dispatches Army of Lobbyists to Block Generic Covid-19 Vaccines*, The Intercept (April 23, 2021) available at <https://theintercept.com/2021/04/23/covid-vaccine-ip-waiver-lobbying/>.

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

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C. *The significant policy issue writ large: externalizing costs to stakeholders*

As discussed in the immediately preceding section, the treatment of COVID-19 intellectual property is, standing alone, a significant public policy issue. In addition, it is part of a broader debate: whether companies should continue practices that maximize their own financial returns even while exacerbating threats to social and environmental systems. This broader framing of the question also transcends the Company's ordinary business and is therefore not excludable under Rule 14a-8(i)(7). There is an urgent need to address business practices that enhance individual corporations' financial returns to shareholders but harm social and environmental systems and, by extension, diversified portfolios, and the Company's close protection of its vaccine-related intellectual property is a quintessential example of this phenomenon. Below, we explain how this issue has become a central feature of the policy debate in the United States and beyond.

i. Corporate Law and Shareholder Primacy

U.S. corporate directors have long focused their efforts on improving their corporations' financial return to their shareholders. While there has been a fierce debate as to whether corporations should in fact be managed for the benefit of only shareholders or a broader group of stakeholders,<sup>15</sup> the concept of shareholder primacy has dominated corporate law. This doctrine eschews consideration of the external costs of business activity unless those costs affect the corporation's own financial return to its shareholders. A series of Delaware court decisions cemented the place of shareholder primacy in the United States.<sup>16</sup>

The most important of these was the famous *Revlon* case decided by the Delaware Supreme Court in 1985.<sup>17</sup> Other Delaware authority has established that corporations exist primarily to generate shareholder value.<sup>18</sup> *eBay Domestic Holdings, Inc. v. Newmark*<sup>19</sup> is a more recent example of the focus on shareholder wealth maximization, even outside the sale context. The court embraced shareholder primacy, finding that it was a violation of the directors' fiduciary duties to make decisions primarily for the benefit of users of the corporation's platform:

*Having chosen a for-profit corporate form, the craigslist directors are bound by the fiduciary duties and standards that accompany that form.*

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<sup>15</sup> Frederick Alexander, *BENEFIT CORPORATION LAW AND GOVERNANCE: PURSUING PROFIT WITH PURPOSE* (2018) at 21-26.

<sup>16</sup> Joan MacLeod Heminway, *Corporate Purpose and Litigation Risk in Publicly Held U.S. Benefit Corporations*, 40 Seattle Univ. L. Rev. 611, 613 (2017) ("Delaware decisional law is arguably particularly unfriendly to for-profit corporate boards that fail to place shareholder financial wealth maximization first in every decision they make.")

<sup>17</sup> *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173 (Del. 1986) (holding that when a corporation is to be sold in a cash-out merger, the directors' duty is to maximize the cash value to shareholders, regardless of the interests of other constituencies, because there is no long term for the shareholders).

<sup>18</sup> See *Katz v. Oak Indus. Inc.*, 508 A.2d 873, 879 (Del. Ch. 1986) ("It is the obligation of directors to attempt, within the law, to maximize the long-run interests of the corporation's stockholders; that they may sometimes do so 'at the expense' of others [e.g., debtholders] . . . does not . . . constitute a breach of duty."); Leo E. Strine, Jr., *The Social Responsibility of Boards of Directors and Stockholders in Change of Control Transactions: Is There Any "There" There?*, 75 S. Cal. L. Rev. 1169, 1170 (2002) ("The predominant academic answer is that corporations exist primarily to generate stockholder wealth, and that the interests of other constituencies are incidental and subordinate to that primary concern.")

<sup>19</sup> 16 A.3d 1 (Del. Ch. 2010).

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*Those standards include acting to promote the value of the corporation for the benefit of its stockholders. The “Inc.” after the company name has to mean at least that. Thus, I cannot accept as valid . . . a corporate policy that specifically, clearly, and admittedly seeks not to maximize the economic value of a for-profit Delaware corporation for the benefit of its stockholders.<sup>20</sup>*

Shareholder primacy has caused great consternation regarding the harm that it imposes on stakeholders and the public.<sup>21</sup> In response, the benefit corporation option was created to provide a corporate form where directors could prioritize interests other than the corporation’s financial return to shareholders. This form allows corporate managers to consider interests of shareholders other than internal financial return:

*[F]or widely held public corporations, most shareholders are broadly diversified investors who are dependent on a stable society and environment to support all of their investments and would be financially injured if some corporations create extra profits by externalizing social and environmental costs.<sup>22</sup>*

ii. Legislative action signals significant public policy issue

The clearest signal of the significance of the policy issue at stake in corporate prioritization of financial return is the legislative action taken to address the issue around the nation and the world. Beginning in 2010, U.S. jurisdictions began to adopt benefit corporation provisions, which created a corporate form that required directors to consider other stakeholder interests. Legislatures have acted in 39 U.S. jurisdictions, the Canadian province of British Columbia, and the countries of Italy, Colombia, and Ecuador over the last decade to make this new form available. In addition, legislation was introduced in the last U.S. Congress in both houses that would have imposed benefit corporation duties on the directors of all billion-dollar companies.<sup>23</sup> The issue even surfaced in the most recent U.S. presidential election, as one candidate decried “the era of shareholder capitalism.”<sup>24</sup> In response, critics argued that favoring shareholders was the best recipe for a successful economy:

*In reality, corporations do enormous social good precisely by seeking to*

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<sup>20</sup> *Id.* at 34-35 (referring to corporate justification for a shareholder rights plan meant to forestall a change in control that might threaten platform users’ interests).

<sup>21</sup> See generally, Lynn Stout, THE SHAREHOLDER VALUE MYTH: HOW PUTTING SHAREHOLDERS FIRST HARMS INVESTORS, CORPORATIONS AND THE PUBLIC (2012).

<sup>22</sup> Frederick Alexander, *How to Leverage Benefit Governance*, in Katayun Jaffari and Stephen Pike, ESG IN THE BOARDROOM: A GUIDEBOOK FOR DIRECTORS (American Bar Association, forthcoming).

<sup>23</sup> Copies of the legislation are available here: <https://www.congress.gov/bill/116th-congress/senate-bill/3215?q=%7B%22search%22%3A%5B%22accountable+capitalism+act%22%5D%7D&s=1&r=1> (Senate) and here: <https://www.congress.gov/bill/116th-congress/house-bill/6056?q=%7B%22search%22%3A%5B%22accountable+capitalism+act%22%5D%7D&s=2&r=2> (House)

<sup>24</sup> *Biden says investors ‘don’t need me,’ calls for end of ‘era of shareholder capitalism,’* (CNBC) (July 9, 2020), available at <https://www.cnbc.com/2020/07/09/biden-says-investors-dont-need-me-calls-for-end-of-era-of-shareholder-capitalism.html>.

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*generate returns for shareholders.*<sup>25</sup>

iii. Trust Law

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

*In addition, Final Rules should also permit stewardship that discourages portfolio companies from engaging in behavior that harms society and the environment, and consequently the value of shareholders' diversified portfolios (For example, plan fiduciaries might vote to encourage all companies to lower their carbon footprint, not because it will necessarily increase return at each and every company, but because it will promote a strong economy and thus increase the return of their diversified portfolio).*<sup>26</sup>

Further evidencing the widespread debate around this issue, those Final Rules were suspended by Executive Order by the President of the United States on Inauguration Day<sup>27</sup> and a new set of Rules Proposed in their place.<sup>28</sup>

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

*The Congress finds the following:*

*(1) Fiduciaries for retirement plans should...*

*(D) consider the impact of plan investments on the stability and resilience*

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<sup>25</sup> Andy Pudzer, *Biden's Assault on 'Shareholder Capitalism*, (Wall Street Journal) (August 17, 2020), available at <https://www.wsj.com/articles/bidens-assault-on-shareholder-capitalism-11597705153>.

<sup>26</sup> Frederick Alexander, *The Final DOL Rules Confirm That Fiduciary Duty Includes 'Beta Activism'*, RESPONSIBLE INVESTOR (December 15, 2020) available at <https://www.responsible-investor.com/articles/the-final-dol-rules-confirm-that-fiduciary-duty-includes-beta-activism>.

<sup>27</sup> *Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis*, (January 20, 2021), available at <https://www.federalregister.gov/documents/2021/01/25/2021-01765/protecting-public-health-and-the-environment-and-restoring-science-to-tackle-the-climate-crisis>

<sup>28</sup> Proposed Rule RIN 1210-AC03, 85 FR 57272 (2021).

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*of the financial system; ...*<sup>29</sup>

While the bill related to costs to the financial system, rather than public health, it was clearly focused on the same policy concern: costs that a company's profit-seeking activities impose on stakeholders.<sup>30</sup>

## **2. The Proposal is not excludable pursuant to Rule 14a-8(i)(11)**

The Company argues that the Proposal is duplicative of the earlier-submitted Oxfam Proposal. The Company argues that the two proposals have the same "thrust and focus" because they each concern COVID-19. But an examination of the proposals quickly reveals that they have entirely different focuses.

The Proposal asks for a report on the effect that the Company's limited sharing of COVID-19 vaccine technology could have on public health costs and financial market returns. The Oxfam Proposal asks for a report on how the Company accounts for the receipt of government support when setting prices or taking other actions that affect access to COVID-19 vaccines or therapeutics.

These are entirely different questions. The Proposal is about the effect a current Company policy (technology protection) has on two matters (public health and market performance). The Oxfam Proposal is about how certain Company decisions (e.g., pricing) account for a historical fact (government support for research and development). The factual inquiry requested in the Proposal simply does not involve the relationship explored by the Oxfam Proposal.

In other words, a report on certain inputs (the receipt of subsidies) into decisions that may or may not involve the protection of technology will not satisfy a request for an inquiry into the impact that those decisions have. For example, the Company might account for subsidies by deciding to surrender value through pricing or other decisions in order to be "fair," but continue to protect its vaccine technology in a manner that harms public health and market returns. As the IMF noted, there is \$9 trillion of economic value at stake in optimizing the global reaction to COVID-19, far more than the \$2.1 billion in government aid cited in the Statement of Support for the Oxfam Proposal.

This distinction is made clear by the Company's letter (the "Oxfam Company Letter") to the Staff seeking to exclude the Oxfam Proposal under Rule 14a-8(b)(i)(10), which allows exclusion of proposals that have been substantially implemented.<sup>31</sup> That letter details the actions that the Company has taken that it believes implement the request in the Oxfam Proposal:

- A public commitment to ensure access
- Commitment to bringing affordable vaccine to the public
- Discussion of contributing a vaccine on a not-for-profit basis
- Using a pricing formula designed for lower-income countries

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<sup>29</sup> H.R. 8959 (116th): Retirees Sustainable Investment Policies Act of 2020

<sup>30</sup> See also Frederick Alexander, Holly Ensign-Barstow, Lenore Palladino, and Andrew Kassoy, *From Shareholder Primacy to Stakeholder Capitalism: A Policy Agenda for Systems Change* (arguing that fiduciary duties of trustees should incorporate external costs of individual companies that harm portfolios).

<sup>31</sup> The request is available here: <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2021/oxfamjohnson120821-14a8-incoming.pdf>.

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- Support for procuring and distributing vaccines to lower income countries
  - Commitment to make up to 900 million doses of vaccine available
  - Provision of vaccine to vulnerable populations in conflict zones and humanitarian settings
  - License agreement with third-party finisher in Africa

All these items are consistent with the Company's continuing to enforce its intellectual property rights over vaccine technology *but none of them addresses the cost to public health or market returns of continuing to do so*. Indeed, it is very telling that, even though the Company Letter argues that the Proposal is essentially the same as the Oxfam Company Proposal, it does not claim that these items were in fact sufficient to substantially implement the Proposal. If the Oxfam Proposal has been substantially implemented, but the Proposal has not, how can the two have the "same thrust and focus"?

Faced with this lacuna in its reasoning, the Company Letter makes statements that are simply wrong on their face:

*The principal thrust and focus of the Proposal and the Prior Proposal are the same – an assessment of Johnson & Johnson's decision-making with regard to COVID-19 vaccine access. Specifically, the Proposal asks Johnson & Johnson to report on "costs created by the limited sharing of [Johnson & Johnson's] COVID-19 vaccine technologies and any consequent reduced availability in poorer nations."*

The second sentence clearly contradicts the first: asking for a report on "costs created" by a decision is not the "same" as asking how that decision was made.

Similarly, the Company Oxfam Letter does not argue that the Oxfam Proposal can be excluded as ordinary business, even though The Company Letter makes that claim about the Proposal, and even though the Company Letter claims the proposal are the "same." The failure to make the argument is another tacit admission that the Proposal is not duplicative of the Oxfam Proposal.

## CONCLUSION

The Proposal addresses a significant policy issue: whether companies should continue to maximize financial returns when doing so harms critical systems in a manner that harms diversified investors. It addresses that issue with respect to the Company's use of intellectual property rights to prevent the production of COVID-19 vaccines. Both the general issue and the specific case have been prominently debated in the public sphere recently, as politicians, nations, and businesses argue over the need to encourage innovation and to protect public health and the global economy. The Company itself has taken a public stand on its own and through hired lobbyists that represent them—it essentially argues that the Proposal does not involve a significant policy issue even as the Company tries to affect the policy.

Nor does the Proposal duplicate an earlier proposal that does not raise any question about the relationship between company financial return and systemic issues, and that the Company claims to have

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already implemented, even though that implementation does not purport to address any of the questions raised in the Proposal.

Based on the foregoing, it is clear that the Company has provided no basis for the conclusion that the Proposal is excludable from the 2022 proxy statement pursuant to Rule 14a-8. As such, we respectfully request that the Staff inform the Company that it is denying the no-action letter request. If you have any questions, please contact me at [rick@theshareholdercommons.com](mailto:rick@theshareholdercommons.com) or 302-485-0497.

Sincerely,



Rick Alexander  
CEO

cc: Marc Gerber  
Jeffrey Field

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**BY EMAIL** (shareholderproposals@sec.gov)

January 14, 2022

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 – 2022 Annual Meeting  
Supplement to Letter dated December 8, 2021  
Relating to Shareholder Proposal of Jeffrey E. Field

Ladies and Gentlemen:

We refer to our letter dated December 8, 2021 (the “No-Action Request”), submitted on behalf of our client, Johnson & Johnson, a New Jersey corporation, pursuant to which we requested 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 the shareholder proposal and supporting statement (the “Proposal”) submitted by Jeffrey E. Field (the “Proponent”) may be excluded from the proxy materials to be distributed by Johnson & Johnson in connection with its 2022 annual meeting of shareholders (the “2022 proxy materials”).

This letter is in response to the letter to the Staff, dated January 7, 2022, submitted by The Shareholder Commons on behalf of the Proponent (the “Proponent’s Letter”), and supplements the No-Action Request. In accordance with Rule 14a-8(j), a copy of this letter also is being sent to the Proponent.

The Proponent's Letter presents an unconvincing attempt to rebut the No-Action Request. In particular, it argues that the Proposal should not be excluded as relating to Johnson & Johnson's ordinary business because it focuses on a significant policy issue. The Proponent's Letter also claims that the Proposal is not substantially duplicative of the Prior Proposal (as defined in the No-Action Request) because Johnson & Johnson has argued elsewhere that the Prior Proposal has been substantially implemented. Neither argument is persuasive.

With regard to the ordinary business exclusion, the Proponent's Letter appears to concede that a proposal relating to a company's decisions concerning licensing and safeguarding its intellectual property relates to a company's ordinary business matters. Faced with this inconvenient obstacle, the bulk of the Proponent's Letter argues that the Proposal falls within the significant policy issue exception to the ordinary business exclusion. In doing so, the Proponent's Letter emphasizes the alleged impact of these intellectual property decisions on "diversified" investors. The Proponent's Letter then detours to an irrelevant discussion about shareholder primacy and public benefit corporations. While these issues may be of interest to the Proponent, they have no bearing on this particular Proposal. Rather, the Proponent's Letter confirms that the focus of the Proposal is on the macroeconomic effect of Johnson & Johnson's intellectual property decisions, which is not a significant policy issue. As described in the No-Action Request, the Proposal's concern with Johnson & Johnson's decisions about whether and how to share its product technologies and how to safeguard its intellectual property and the economic effect of those determinations clearly demonstrates that the Proposal is focused on Johnson & Johnson's ordinary business matters and not on a significant policy issue.

The Proponent's Letter also attempts to refute Johnson & Johnson's substantial duplication argument by pointing to Johnson & Johnson's submission of different arguments for no-action relief on the Prior Proposal and the Proposal. Specifically, the Proponent's Letter notes that Johnson & Johnson argued that (i) the Prior Proposal was substantially implemented under Rule 14a-8(i)(10) but did not make the same argument regarding the Proposal, and (ii) the Proposal focuses on ordinary business matters under Rule 14a-8(i)(7) but did not make the same argument regarding the Prior Proposal.

The precise nature of a company's arguments in different no-action letters is irrelevant to the question of whether a proposal is excludable under Rule 14a-8(i)(11). The relevant test is whether the proposals are substantially duplicative, not whether a company's no-action requests are identical. Moreover, as explained in the No-Action Request, the Staff has consistently taken the position that shareholder proposals are substantially duplicative if their principal thrust or focus is

substantially the same, even if the breadth or scope of the proposals differ. Accordingly, it stands to reason that the proposals at issue could be subject to different arguments for no-action relief.

In addition, the Proponent's Letter mischaracterizes the argument in the No-Action Request as "the two proposals have the same 'thrust and focus' because they each concern COVID-19." In fact, the No-Action Request states that, while there may be differences in breadth or scope, the thrust and focus of the Proposal and the Prior Proposal are the same because they both request "an assessment of Johnson & Johnson's decision-making with regard to COVID-19 vaccine access." Although the two proposals may vary in the details, they share a fundamental thrust and focus on Johnson & Johnson's decision-making with respect to COVID-19 vaccine access. Therefore, as described in the No-Action Request, the inclusion of both proposals in Johnson & Johnson's 2022 proxy materials would be duplicative and would frustrate the policy concerns underlying the adoption of Rule 14a-8(i)(11).

Accordingly, because the Proposal substantially duplicates the Prior Proposal, which was previously submitted to Johnson & Johnson and will be included in the 2022 proxy materials, the Proposal may be excluded pursuant to Rule 14a-8(i)(11) in the event that the Staff does not concur with the exclusion of the Prior Proposal from Johnson & Johnson's 2022 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

cc: Matt Orlando  
Worldwide Vice President, Corporate Governance and Corporate Secretary  
Johnson & Johnson

Jeffrey E. Field  
Harrington Investments, Inc.

John Harrington  
Harrington Investments, Inc.

Brianna Harrington  
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January 18, 2022

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

*RE: Shareholder proposal to Johnson & Johnson regarding effect of public health costs on diversified shareholders*

Division of Corporate Finance Staff Members:

Jeffrey E. Field (the "Proponent") is beneficial owner of common stock of Johnson & Johnson (the "Company") and has submitted a shareholder proposal (the "Proposal") to the Company. The Proponent has asked me to respond to the letter dated January 14, 2022 (the "Company Reply") that Marc Gerber ("Company Counsel") sent to the Securities and Exchange Commission (the "SEC"). The Company Reply was written in response to the undersigned's letter dated January 7, 2022 (the "Proponent's Response"), which in turn responded to the Company's original no-action request regarding the Proposal (the "Company Letter"). This letter makes use of terms defined in the Proponent's Response.

I am writing this letter to respond to five assertions included in the Company Reply, each of which distracts from the actual arguments made in the Proponent's Response, which makes a straightforward argument and relies on past guidance from the Commission and Staff as well as the public record, none of which is in dispute.

***Incorrect assertion 1: It is "an inconvenient obstacle" that the Proposal may relate to ordinary business matters.***

The Commission has made it very clear that a proposal that relates to a significant social policy issue will not be excluded, even if it relates to a company's ordinary business. As the 1998 Release clearly stated:

*Certain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight. Examples include the*

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

The Staff's recently released guidance in *SLB L* reiterates this very point, including an explanation that a "human capital management" issue could not be excluded if it related to an issue with "broad societal impact":

*. . . . For example, **proposals squarely raising human capital management issues with a broad societal impact would not be subject to exclusion solely because the proponent did not demonstrate that the human capital management issue was significant to the company.***

This would be true even if the proposal related to the otherwise ordinary business of "hiring, promotion and termination" described in the 1998 Release. The Proponent's Response follows this long-established course by showing that decisions not to share vaccine technology may be made in the ordinary course of business but nevertheless have "a broad societal impact."

*Incorrect assertion 2: "[T]he macroeconomic effect of Johnson & Johnson's intellectual property decisions... is not a significant policy issue."*

The Company's Reply states this as if it were a fact, but does not justify the dubious claim that the macroeconomic effect of decisions that affect vaccine availability do not have the broad societal impact that characterizes a significant policy issue: the pandemic has infected more than 300,000,000 and killed more than 5,500,000 human beings and continues to spread and mutate.<sup>1</sup> As detailed in the Proponent's Response:

- The IMF has estimated that a proper response to the pandemic could increase global GDP by \$9 trillion
- U.S. Senators have weighed in on both sides of the issue as to whether the Company and other companies that have vaccine technology should be sharing it more broadly
- Different countries have taken different positions on this issue
- The Company itself has taken public positions on this issue

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<sup>1</sup> <https://www.worldometers.info/coronavirus/>

- The Company has retained lobbyists to influence government policies on this issue.

The President of the United States reissued his call for a waiver of vaccine-related intellectual property rights as recently as November 26, 2021, noting that news relating to the Omicron variant reiterated the importance of the waiver:

*I call on the nations gathering next week for the World Trade Organization ministerial meeting to meet the U.S. challenge to waive intellectual property protections for COVID vaccines, so these vaccines can be manufactured globally. I endorsed this position in April; this news today [the spread of the Omicron variant] reiterates the importance of moving on this quickly.<sup>2</sup>*

The Company's assertion that intellectual property decisions to limit broader distribution of its vaccine technologies is not a significant policy issue is untenable.

***Incorrect assertion 3: The Proponent's Response includes "an irrelevant discussion about shareholder primacy and public benefit corporations."***

Decisions to withhold vaccine technology can improve the Company's bottom line but damage the world economy, as explained in the Senators' Letter:

*The TRIPS waiver is also essential to ensure all global economies, including the United States' economy, can recover from the pandemic and thrive.*

The discussion of shareholder primacy in the Proponent's Response demonstrated that the TRIPS waiver and related questions are embedded in a larger policy issue: the advisability of policies that prioritize a corporation's financial returns over its impact on society and, by extension, diversified portfolios. The Proponent's Response showed that this issue has been the subject of "legislative and regulatory initiatives" and has "broad societal impact": previously articulated tests for the significant public-policy exception. Given the question at hand—a for-profit company's decision to withhold vaccine technology—this discussion is highly relevant.

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

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<sup>2</sup> <https://www.whitehouse.gov/briefing-room/statements-releases/2021/11/26/statement-by-president-joe-biden-on-the-omicron-covid-19-variant/>. The ministerial meeting was canceled later that day, due to the spread of the Omicron variant

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2021) (“a proposal related to the external public health costs... may raise a significant policy issue that transcends a company’s ordinary business operations”).

***Incorrect assertion 4: Proponent’s Letter “claims that the Proposal is not substantially duplicative of the Prior Proposal (as defined in the No-Action Request) because Johnson & Johnson has argued elsewhere that the Prior Proposal has been substantially implemented.”***

The Proponent’s Letter does note the passing strangeness (“it is telling”) of the Company’s claim that the Proposal substantially duplicates the Oxfam Proposal while proffering entirely different arguments for the two proposals’ exclusion. However, it does not claim that this unusual mode of argumentation is the reason the Proposal is not substantially duplicative. Instead, the Proponent’s Letter shows that the Proposal does not duplicate the Oxfam Proposal because the two proposals raise different concerns and ask for different reports. That argument stands on its own, without reference to the fact that the Company has made different arguments for exclusion with respect to the two purportedly duplicative proposals.

Importantly, however, the Proponent’s Response does (1) note that the Company argued that the Oxfam Proposal was substantially implemented by pointing to a number of actions the Company has previously taken and (2) show that none of these actions is responsive to the Proposal. We maintain that this analysis provides strong evidence that the two proposals are not duplicative.

***Incorrect assertion 5. The Proponent’s Response did not address the Company’s argument that the Proposal and the Oxfam Proposal were substantially the same because they addressed “an assessment of Johnson & Johnson’s decision-making with regard to COVID-19 vaccine access.”***

The Company’s Reply includes the following claim:

*In addition, the Proponent’s Letter mischaracterizes the argument in the No-Action Request as “the two proposals have the same ‘thrust and focus’ because they each concern COVID-19.” In fact, the No-Action Request states that, while there may be differences in breadth or scope, the thrust and focus of the Proposal and the Prior Proposal are the same because they both request “an assessment of Johnson & Johnson’s decision-making with regard to COVID-19 vaccine access.”*

This straw-person assertion implies that the Proponent’s Letter did not address the Company’s actual argument for exclusion. In fact, the following excerpt from the Proponent’s Response fully quotes and addresses the “decision-making” characterization by pointing out that the assertion is simply not true:

*[T]he Company Letter makes statements that are simply wrong on their face:*

The principal thrust and focus of the Proposal and the Prior Proposal are the same – an assessment of

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Johnson & Johnson's decision-making with regard to COVID-19 vaccine access. Specifically, the Proposal asks Johnson & Johnson to report on "costs created by the limited sharing of [Johnson & Johnson's] COVID-19 vaccine technologies and any consequent reduced availability in poorer nations."

*The second sentence clearly contradicts the first: asking for a report on "costs created" by a decision is not the "same" as asking how that decision was made.*

In other words, and as the Proponent's Response shows in detail, the Proposal and the Oxfam Proposal, while both related to COVID-19 vaccines, address entirely different concerns (macroeconomic effects v. use of government aid) and seek reports on entirely different matters (macroeconomic impact, including impact on diversified portfolios v. inclusion of government aid in methodology of decision-making).

\* \* \* \*

We note the Company's request for the opportunity to confer prior to the issuance of any decision not to concur with the Company's view that the Proposal can be excluded. We do not agree that such a conference is necessary, particularly in light of the Staff's recent decision to provide letters in support of its decisions regarding 14a-8 no-action requests, but would ask to be included in any such conversations.

We respectfully renew our request that the Staff inform the Company that it does not concur in the Company's 14a-8 analysis. If you have any questions, please contact me at [rick@theshareholdercommons.com](mailto:rick@theshareholdercommons.com) or 302-485-0497.

Sincerely,

Frederick Alexander  
CEO

cc: Marc Gerber  
Jeffrey Field