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

DIVISION OF
CORPORATION FINANCE

March 1, 2024

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

Re: Johnson & Johnson (the "Company")
Incoming letter dated December 12, 2023

Dear Marc S. Gerber:

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

The Proposal requests that the board of directors adopt a policy, and amend the bylaws as necessary, requiring directors to disclose their expected allocation of hours among all formal commitments set forth in the director's official bio on a weekly, monthly, or annual basis.

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

Copies of all of the correspondence on which this response is based will be made available on our website at https://www.sec.gov/corpfin/2023-2024-shareholder-proposals-no-action.

Sincerely,

Rule 14a-8 Review Team

cc: Scott Shepard
National Center for Public Policy Research

SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP
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WASHINGTON, D.C. 20005-2111

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VIA STAFF ONLINE FORM

December 12, 2023

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 – 2024 Annual Meeting
Omission of Shareholder Proposal of
National Center for Public Policy Research

Ladies and Gentlemen:

Pursuant to Rule 14a-8(j) promulgated under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), we are writing on behalf of our client, Johnson & Johnson, a New Jersey corporation, to request that the Staff of the Division of Corporation Finance (the "Staff") of the U.S. Securities and Exchange Commission (the "Commission") concur with Johnson & Johnson's view that, for the reasons stated below, it may exclude the shareholder proposal and supporting statement (the "Proposal") submitted by the National Center for Public Policy Research (the "Proponent") from the proxy materials to be distributed by Johnson & Johnson in connection with its 2024 annual meeting of shareholders (the "2024 proxy materials").

In accordance with relevant Staff guidance, we are submitting this letter and its attachments to the Staff through the Staff's online Shareholder Proposal Form. 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 2024 proxy materials.

Rule 14a-8(k) and Section E of Staff Legal Bulletin No. 14D (Nov. 7, 2008) provide that shareholder proponents are required to send companies a copy of any correspondence that the shareholder proponents elect to submit to the Commission or the Staff. Accordingly, we are taking this opportunity to remind the Proponent that if the Proponent submits correspondence to the Commission or the Staff with respect to the Proposal, a copy of that correspondence should concurrently be furnished to Johnson & Johnson.

I. The Proposal

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

> **RESOLVED**
>
> Shareholders request the Board of Directors to adopt a policy, and amend the bylaws as necessary, requiring Company directors to disclose their expected allocation of hours among all formal commitments set forth in the director's official bio. Allocation may be on a weekly, monthly, or annual basis. This policy would be phased in for the next election of directors in 2025.

II. Bases for Exclusion

We hereby respectfully request that the Staff concur with Johnson & Johnson's view that it may exclude the Proposal from the 2024 proxy materials pursuant to:

- Rule 14a-8(b)(1) and Rule 14a-8(f)(1) because the Proponent failed to timely provide proof of the requisite stock ownership after receiving notice of such deficiency; and

- Rule 14a-8(i)(7) because the Proposal deals with matters relating to Johnson & Johnson's ordinary business operations.

III. Background

Johnson & Johnson received the Proposal via FedEx on November 15, 2023, accompanied by a cover letter from the Proponent, dated November 14, 2023. On November 22, 2023, Johnson & Johnson received a letter from Wells Fargo Advisors purporting to verify the Proponent's stock ownership (the "Wells Fargo Letter"). The Wells Fargo Letter, however, indicated that the Proponent's account was established on August 4, 2023. Accordingly, on November 27, 2023, Johnson & Johnson sent a letter to the Proponent (the "Deficiency Letter") noting that the Wells Fargo Letter is insufficient to establish the requisite ownership levels because "it only covers the period from August 4, 2023 to November 14, 2023" and that "[t]here is a gap in the period of

ownership from November 14, 2020 through August 3, 2023." In addition, the Deficiency Letter specifically instructed the Proponent on how to remedy this deficiency. On December 5, 2023, Johnson & Johnson received, via email from the Proponent, a letter from UBS Financial Services, dated December 4, 2023 (the "UBS Letter"), which included statements from UBS Financial Services that the Proponent transferred "95 individual equity positions" and "cost basis data" from UBS Financial Services to Wells Fargo during the month of October 2023. The UBS Letter did not provide verification that the Proponent satisfied the stock ownership requirements continuously for the period identified in the Deficiency Letter. Copies of the Proposal, cover letter, Wells Fargo Letter, UBS Letter and related correspondence are attached hereto as Exhibit A.

IV. The Proposal May be Excluded Pursuant to Rule 14a-8(b)(1) and Rule 14a-8(f)(1) Because the Proponent Failed to Timely Provide Proof of the Requisite Stock Ownership After Receiving Notice of Such Deficiency.

Rule 14a-8(b)(1) provides that, in order to be eligible to submit a proposal, a shareholder must have continuously held (i) at least $2,000 in market value of the company's common stock for at least three years, preceding and including the date that the proposal was submitted; (ii) at least $15,000 in market value of the company's common stock for at least two years, preceding and including the date that the proposal was submitted; or (iii) at least $25,000 in market value of the company's common stock for at least one year, preceding and including the date that the proposal was submitted. If the proponent is not a registered holder, he or she must provide proof of beneficial ownership of the securities. Under Rule 14a-8(f)(1), a company may exclude a shareholder proposal if the proponent fails to provide evidence that he or she meets the eligibility requirements of Rule 14a-8(b), provided that the company notifies the proponent of the deficiency within 14 calendar days of receiving the proposal and the proponent fails to correct the deficiency within 14 days of receiving such notice.

The Staff has consistently permitted exclusion under Rule 14a-8(f)(1) of shareholder proposals where a proponent has failed to provide timely evidence of eligibility to submit a shareholder proposal in response to a timely deficiency notice from the company. *See, e.g.*, *The Home Depot, Inc.* (Mar. 9, 2023) (permitting exclusion of a proposal under Rule 14a-8(f)(1) where the proponent failed to supply any evidence of eligibility to submit a shareholder proposal after receiving the company's timely deficiency notice); *The Walt Disney Co.* (Sept. 28, 2021)* (permitting exclusion under Rule 14a-8(f)(1) of a proposal where the proponent failed to supply any evidence of eligibility to submit a shareholder proposal after receiving the company's timely deficiency notice); *PG&E Corp.* (May 26, 2020)* (permitting exclusion under Rule 14a-8(f)(1) of a proposal where the proponent failed to supply any evidence of

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* Citations marked with an asterisk indicate Staff decisions issued without a letter.

eligibility to submit a shareholder proposal after receiving the company's timely deficiency notice).

In this instance, the Proponent has failed to provide adequate evidence of its eligibility to submit a shareholder proposal to Johnson & Johnson after receiving a timely deficiency notice from Johnson & Johnson. In this regard, on November 22, 2023, after receiving the Proposal on November 15, 2023, Johnson & Johnson received the Wells Fargo Letter, which failed to provide sufficient evidence of the Proponent's eligibility to submit the Proposal because it contained an ambiguous representation as to the Proponent's continuous ownership of Johnson & Johnson common stock during the period from November 13, 2020 to August 3, 2023. On the one hand, the Wells Fargo Letter represented that the Proponent "holds, and has held continuously since November 13, 2020, more than $2,000 of Johnson & Johnson common stock." At the same time, the Wells Fargo Letter stated unequivocally that the Proponent's account with Wells Fargo was established "on 08/04/2023." Accordingly, the Wells Fargo Letter could only verify the Proponent's continuous holding of Johnson & Johnson's common stock for the period since inception of the account.

On November 27, 2023, Johnson & Johnson sent the Deficiency Letter to the Proponent, via email, timely notifying the Proponent of the Proponent's failure to provide adequate proof of the requisite stock ownership. The Deficiency Letter specifically referenced the defect in the Wells Fargo Letter and explained how the deficiency could be cured, noting that the Wells Fargo Letter was "insufficient to establish the requisite ownership levels [. . .] because it only covers the period from August 4, 2023 to November 14, 2023" and that "[t]here is a gap in the period of ownership from November 14, 2020 through August 3, 2023." In particular, the Deficiency Letter requested a written statement from the record holder of the Proponent's shares "verifying that the [P]roponent has beneficially held the requisite number of shares of Johnson & Johnson common stock continuously for the period from November 14, 2020 through August 3, 2023." The Deficiency Letter also requested that the Proponent furnish such written statement to Johnson & Johnson within 14 days of the Proponent's receipt of the Deficiency Letter. The Deficiency Letter was sent to the Proponent, via email, on November 27, 2023. Accordingly, to be timely, adequate proof of ownership would have needed to be received by Johnson & Johnson by December 11, 2023.

In response to the Deficiency Letter, on December 5, 2023, Johnson & Johnson received an email from the Proponent, which attached the UBS Letter. The Proponent's email states:

> NCPPR's continuous stock ownership was established via the cost-basis data that was transferred by UBS to Wells Fargo when we established our account with Wells Fargo. This information routinely transfers when assets are transferred, and the adequacy of this transfer is implicit in the proof of ownership letter from Wells

> Fargo because Wells Fargo would not affirm our relevant ownership without a reasonable basis for doing so. The attached letter from UBS further confirms this.

The UBS Letter, however, is insufficient to establish continuous ownership of the Proponent's holdings for the requisite period. In fact, it does not establish any historical record of the Proponent's ownership of Johnson & Johnson common stock for purposes of Rule 14a-8. It states that, "During the month of October 2023, the [Proponent] transferred assets, including 95 individual equity positions, from UBS Financial Services […] to Wells Fargo account [redacted]. As part of this transfer UBS Financial Services transmitted cost basis data, including purchase date and purchase price, for each of these 95 equity positions . . ." The UBS Letter does not verify the Proponent's continuous ownership of Johnson & Johnson common stock for any particular period. Thus, the Proponent has failed to provide that it continuously held Johnson & Johnson common stock from November 14, 2020 through August 3, 2023. Moreover, the Proponent's assertion that proof of ownership is "implicit" in the Wells Fargo Letter demonstrates a misunderstanding of the explicit proof that is required to demonstrate eligibility to submit shareholder proposals under Rule 14a-8. Johnson & Johnson did not receive any other purported proof of the Proponent's stock ownership.

Accordingly, consistent with the precedent described above, the Proposal may be excluded pursuant to Rule 14a-8(b)(1) and Rule 14a-8(f)(1) as the Proponent has failed to timely provide proof of the requisite stock ownership after receiving timely notice of such deficiency.

V. 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. As demonstrated below, the Proposal implicates this second consideration.

As the Commission has explained, a proposal may attempt to micromanage a company by probing too deeply into matters of a complex nature if, among other things, it "involves intricate detail." *See 1998 Release; see also, e.g., Amazon.com, Inc.* (April 7, 2023). The Commission further noted that "proposals may seek a reasonable level of

detail" without crossing the line into micromanagement. *See 1998 Release*. In Staff Legal Bulletin No. 14L (Nov. 3, 2021) ("SLB 14L"), the Staff explained that it will take a "measured approach to evaluating companies' micromanagement arguments," focusing on "the level of granularity sought in the proposal." The Staff further explained that an appropriate level of detail should "be consistent with that needed to enable investors to assess an issuer's impacts, progress towards goals, risks or other strategic matters appropriate for shareholder input."

Consistent with this approach, the Staff has permitted the exclusion of proposals that sought excessive and overly granular detail. For example, in *Deere & Co.* (Jan. 3, 2022), the Staff permitted exclusion under Rule 14a-8(i)(7) of a proposal that requested the annual publication of the "written and oral content of any employee-training materials" offered to the company's employees, noting that the proposal probed "too deeply into matters of a complex nature by seeking disclosure of intricate details regarding the [c]ompany's employment and training practices" and thus constituted micromanagement. *See also American Express Co.* (Mar. 11, 2022) (same); *Verizon Communications Inc.* (Mar. 17, 2022) (same). Similarly, in *GameStop Corp.* (Apr. 25, 2023), the Staff permitted exclusion under Rule 14a-8(i)(7) of a proposal that requested the company provide detailed and current information regarding shareholder ownership of the company to the public and also provide a searchable history of this information, noting that the proposal "seeks to micromanage the [c]ompany."

In this instance, the Proposal seeks to micromanage Johnson & Johnson by seeking extremely intricate detail and thereby probing too deeply into matters of a complex nature. It does so by requesting that Johnson & Johnson require public disclosure of each Johnson & Johnson director's expected allocation of hours, on a weekly, monthly or annual basis, among all formal commitments set forth in the director's official bio. This request is inappropriate and wholly inconsistent with the type of information that investors need to assess the fundamental concern of the Proposal, which is director "overboarding."

In this regard, institutional investors, proxy advisory firms and companies have a variety of policies on the topic of director overboarding, and proxy advisory firms and institutional investors have reasonable levels of information on which to make voting recommendations or decisions.[1] In addition, Johnson & Johnson has an overboarding policy—Johnson & Johnson's Principles of Corporate Governance provide that a Johnson & Johnson director who serves as a chief executive officer (or similar position) should not serve on more than two total public company boards, and other Johnson &

[1] *See, e.g.*, page 17 of BlackRock 2023 Global Voting Spotlight; page 3 of Vanguard Investment Stewardship U.S. Regional Brief.

Johnson directors should not serve on more than five total public company boards (in each case, including the Johnson & Johnson board).[2]

Johnson & Johnson's overboarding policy, as well as the voting policies of institutional investors and proxy advisory firms, address the issue of director commitments based on reasonable information that shareholders can assess. The granular information sought by the Proposal, however, goes far beyond the level of information necessary for investors to evaluate whether directors are overcommitted.

We note the Staff's view that the subject matter of overboarding limits relates to director qualifications and normally would not be excludable as ordinary business, but we believe the facts here are distinguishable. *See e.g.*, *American International Group, Inc.* (Mar. 6, 2013) ("*AIG*"). For example, in *AIG*, the proposal in question sought a bylaw amendment to limit directors to a maximum of three board memberships in companies with sales in excess of $500 million annually. The current Proposal stands in stark contrast to the proposal in *AIG*, however, as it goes far beyond analyzing or limiting the number of boards on which a director may serve. Rather, the Proposal seeks intricate details of an unnecessarily granular nature. Moreover, as described in SLB 14L, a micromanagement analysis "may apply to any subject matter." Requiring directors to provide an expected allocation of hours across various professional endeavors on a weekly, monthly or even an annual basis, as the Proposal requests, goes well beyond the reasonableness standard articulated by the Commission in the 1998 Release and discussed by the Staff in SLB 14L, and epitomizes the type of overly granular request that constitutes micromanagement.

Accordingly, the Proposal should be excluded from Johnson & Johnson's 2024 proxy materials pursuant to Rule 14a-8(i)(7) as seeking to micromanage Johnson & Johnson.

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2 *See* page 2 of the Johnson & Johnson Principles of Corporate Governance and page 10 of Johnson & Johnson's definitive proxy statement on Schedule 14A for the 2023 Annual Meeting of Shareholders.

VI. Conclusion

Based upon the foregoing analysis, Johnson & Johnson respectfully requests that the Staff concur that it will take no action if Johnson & Johnson excludes the Proposal from its 2024 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: Marc Larkins
Worldwide Vice President, Corporate Governance & Corporate Secretary
Johnson & Johnson

Stefan Padfield
National Center for Public Policy Research

EXHIBIT A

(see attached)

November 14, 2023

Via FedEx to

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

Dear Sir/Madam,

I hereby submit the enclosed shareholder proposal ("Proposal") for inclusion in the Johnson & Johnson (the "Company") proxy statement to be circulated to Company shareholders in conjunction with the next annual meeting of shareholders. The Proposal is submitted under Rule 14(a)-8 (Proposals of Security Holders) of the United States Securities and Exchange Commission's proxy regulations.

I submit the Proposal as an Associate of the Free Enterprise Project of the National Center for Public Policy Research, which has continuously owned Company stock with a value exceeding $2,000 for at least 3 years prior to and including the date of this Proposal and which intends to hold these shares through the date of the Company's 2024 annual meeting of shareholders. A proof of ownership letter is forthcoming.

Pursuant to interpretations of Rule 14(a)-8 by the Securities & Exchange Commission staff, I initially propose as a time for a telephone conference to discuss this proposal Dec. 6, 2023, or Dec. 7, 2023, from 1-4 p.m. eastern. If that proves inconvenient, I hope you will suggest some other times to talk. Please feel free to contact me at [redacted] so that we can determine the mode and method of that discussion.

Copies of correspondence or a request for a "no-action" letter should be sent to me at the National Center for Public Policy Research, 2005 Massachusetts Ave. NW, Washington, DC 20036 and emailed to [redacted].

Sincerely,

Stefan Padfield

cc: Scott Shepard, FEP Director
Enclosures: Shareholder Proposal

Board of Directors Accountability and Transparency Amendment

RESOLVED

Shareholders request the Board of Directors to adopt a policy, and amend the bylaws as necessary, requiring Company directors to disclose their expected allocation of hours among all formal commitments set forth in the director's official bio. Allocation may be on a weekly, monthly, or annual basis. This policy would be phased in for the next election of directors in 2025.

SUPPORTING STATEMENT

Overboarding is an issue specifically addressed by proxy advisors Independent Shareholder Services and Glass Lewis, as well as asset managers BlackRock, Vanguard, and State Street, with none of them recommending more than 6 board commitments per director.[1] In addition, the oversight duties of directors continue to require significant attention, with a McKinsey interview asserting that even as far back as 2014, "if a potential director can't put in 300 to 350 hours a year, she shouldn't take the job."[2] Meanwhile, potential liability for failures of oversight are significant, with relevant litigation from a few years ago related to Boeing including "US$20 billion in non-litigation costs and more than US$2.5 billion in litigation costs."[3]

Meanwhile, a review of Johnson & Johnson's director bios reveals multiple cases of formal commitments exceeding six, with some apparently as high as 17.[4] While it is certainly true that not all, or even most, of these competing commitments involve service as a director on other corporate boards (though many do), the commitments must nonetheless be assumed to be material or else their inclusion in the bios would be potentially misleading.

The excerpt below from a related article provides an example of the type of material information this proposal seeks to reveal. It involves the case of an individual sitting on 4 boards in addition to serving as a CEO. Based on various reasonable assumptions, such an individual:

> should apparently be working 90.5 hours per week or 13 hours per day Monday thru Sunday. But should shareholders really have to perform back-of-the-envelope calculations ... to determine whether their directors are reasonably likely to be devoting appropriate time to a job that is supposedly at the heart of a corporation's governance and for which the director is being well-compensated (it has been reported that the average 2022 compensation for an S&P 500 director was $316,091)?[5]

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[1] https://corpgov.law.harvard.edu/2023/09/25/2023-corporate-governance-developments/

[2] https://www.mckinsey.com/capabilities/strategy-and-corporate-finance/our-insights/are-you-getting-all-you-can-from-your-board-of-directors

[3] https://www.klgates.com/Approval-of-US2375-Million-Settlement-in-Boeing-Derivative-Action-Demonstrates-Impact-of-Section-220-Demand-in-ESG-Litigation-3-23-2022

[4] https://www.jnj.com/leadership/our-leadership-team

[5] https://www.newsmax.com/finance/streettalk/woke-capitalism-board-directors/2023/08/24/id/1131957/

By adopting this proposal, the Company can provide material information that shareholders should not have to worry about. Specifically, the Company can allow shareholders to make fully informed decisions regarding the ability of the Company's directors to devote sufficient time to their important duties.

WELLS FARGO Advisors

1650 Tysons Boulevard, Suite 500
McLean, VA 22102

Direct: [redacted]
Toll Free: [redacted]
Fax: [redacted]

November 20, 2023

National Center for Public Policy Research Inc
2005 Massachusetts Avenue NW
Washington DC 20036-1030

RE: Verification of Assets for Account Number ending in [redacted]

To Whom It May Concern:

In connection with your recent request regarding the verification of certain information about your investment account relationship with Wells Fargo Clearing Services, LLC ("Wells Fargo Advisors"), we are providing this letter as confirmation that:

i (i) You maintain a Brokerage Cash Service account with Wells Fargo Advisors, number ending in [redacted], established on 08/04/2023.

((ii) As of November 20, 2023, the National Center for Public Policy Research holds, and has held continuously since November 13, 2020 more than $2,000 of Johnson & Johnson common stock.

This letter is provided for informational purposes and does not represent future Account value, if this said Account will remain with Wells Fargo Advisors in the future, any purposes not mentioned in this letter, or the creditworthiness of the person(s) referenced within. Wells Fargo Advisors will have no liability with any party's reliance on this letter or the information within. This report is not the official record of your account. However, it has been prepared to assist you with your investment planning and is for informational purposes only. Your Wells Fargo Advisors Client Statement is the official record of your account. Therefore, if there are any discrepancies between this report and your Client Statement, you should rely on the Client Statement and call your local Sales Location Manager with any questions. Cost data and acquisition dates provided by you are not verified by Wells Fargo Advisors. Transactions requiring tax consideration should be reviewed carefully with your accountant or tax advisor. Unless otherwise indicated, market prices/values are the most recent closing prices available at the time of this report and are subject to change. Prices may not reflect the value at which securities could be sold. Past performance does not guarantee future results.

Sincerely,

David A. Bos
Senior Vice President - Investments
Branch Manager – Private Client Group
Direct: [redacted] | Fax: [redacted]

Investment and Insurance Products are:
- **Not Insured by the FDIC or Any Federal Government Agency**
- **Not a Deposit or Other Obligation of, or Guaranteed by, the Bank or Any Bank Affiliate**
- **Subject to Investment Risks, Including Possible Loss of the Principal Amount Invested**

Investment products and services are offered through Wells Fargo Advisors, a trade name used by Wells Fargo Clearing Services, LLC, Member SIPC, a registered broker-dealer and non-bank affiliate of Wells Fargo & Company.

Johnson&Johnson

One Johnson & Johnson Plaza
New Brunswick, NJ 08933

November 27, 2023

VIA EMAIL

Stefan Padfield
National Center for Public Policy Research

Dear Mr. Padfield:

This letter acknowledges receipt by Johnson & Johnson (the "Company") of the shareholder proposal submitted on November 14, 2023 by the National Center for Public Policy Research (the "Proponent") pursuant to Rule 14a-8 under the Securities Exchange Act of 1934, as amended (the "Rule"), for consideration at the Company's 2024 Annual Meeting of Shareholders (the "Proposal").

Paragraph (b) of the Rule provides that shareholder proponents must submit sufficient proof of their continuous ownership of:

- at least $2,000 in market value of a company's common stock for at least three years, preceding and including the date that the proposal was submitted;

- at least $15,000 in market value of a company's common stock for at least two years, preceding and including the date that the proposal was submitted; or

- at least $25,000 in market value of a company's common stock for at least one year, preceding and including the date that the proposal was submitted.

The Company's stock records do not indicate that the Proponent is a record owner of Company shares, and to date, we have not received sufficient proof that the Proponent has satisfied the Rule's ownership requirements. In this regard, we are in receipt of a letter from Wells Fargo Advisors indicating that "[a]s of November 20, 2023, the National Center for Public Policy Research holds, and has held continuously since November 13, 2020 more than $2,000 of Johnson & Johnson common stock." However, the letter also indicates that the account with Wells Fargo Advisors was "established on 08/04/2023." Thus, it is unclear how Wells Fargo Advisors can make any representations as to the Proponent's ownership prior to August 4, 2023. Accordingly, this is insufficient to establish the requisite ownership levels described above because it only covers the period from August 4, 2023 to November 14, 2023. There is a gap in the period of ownership from November 14, 2020 through August 3, 2023.

Please furnish to us, within 14 days of your receipt of this letter, a written statement from the "record" holder of the Proponent's shares (usually a broker or a bank) and a participant in the Depository Trust Company ("DTC") verifying that the

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proponent has beneficially held the requisite number of shares of Johnson & Johnson common stock continuously for the period from November 14, 2020 through August 3, 2023. For example, the Proponent may need to obtain a letter from a previous brokerage firm, if relevant. The Proponent can confirm whether a particular broker or bank is a DTC participant by asking the broker or bank or by checking DTC's participant list, which is currently available on the Internet at: http://www.dtcc.com/client-center/dtc-directories.

If the Proponent's broker or bank is not on the DTC participant list, the Proponent will need to obtain a written statement from the DTC participant through which the Proponent's shares are held verifying that the Proponent beneficially owned the requisite number of Company shares continuously for at least the requisite period. The Proponent should be able to find who this DTC participant is by asking the Proponent's broker or bank. If the broker is an introducing broker, the Proponent may also be able to learn the identity and telephone number of the DTC participant through the Proponent's account statements, because the clearing broker identified on the account statements will generally be a DTC participant. If the DTC participant knows the Proponent's broker or bank's holdings, but does not know the Proponent's holdings, the Proponent can satisfy the proof of ownership requirement by obtaining and submitting two proof of ownership statements verifying that, for at least the requisite period from November 14, 2020 through August 3, 2023, the required amount of securities was continuously held – one from the Proponent's broker or bank confirming the Proponent's ownership, and the other from the DTC participant confirming the Proponent's broker or bank's ownership.

The SEC's rules require that any response to this letter be postmarked or transmitted electronically no later than 14 calendar days from the date you receive this letter. Please address any response to me at . For your convenience, a copy of the Rule is enclosed.

Once we receive any response, we will be in a position to determine whether the Proposal is eligible for inclusion in the proxy materials for the Company's 2024 Annual Meeting of Shareholders. We reserve the right to seek relief from the Securities and Exchange Commission as appropriate.

In the interim, you should feel free to contact either my colleague, Laura McFalls, Assistant Corporate Secretary, at or me at if you wish to discuss the Proposal or have any questions or concerns that we can help to address.

Johnson&Johnson

Best Regards,

Marc Larkins
Worldwide Vice President
Corporate Governance &
Corporate Secretary

ML/tmk

Subject: Shareholder Proposal - National Center for Public Policy Research
Attachments: ACAT Cost Basis Confirmation Letter.pdf

From: Stefan Padfield
Sent: Tuesday, December 5, 2023 9:45 AM
To: Larkins, Marc [JJCUS]
Cc: Kerekgyarto, Terry [JJCUS] ; McFalls, Laura H. [JJCUS] ; Scott Shepard
Subject: [EXTERNAL] Re: Shareholder Proposal - National Center for Public Policy Research

Hi Marc,

NCPPR's continuous stock ownership was established via the cost-basis data that was transferred by UBS to Wells Fargo when we established our account with Wells Fargo. This information routinely transfers when assets are transferred, and the adequacy of this transfer is implicit in the proof of ownership letter from Wells Fargo because Wells Fargo would not affirm our relevant ownership without a reasonable basis for doing so. The attached letter from UBS further confirms this.

Regards,
Stefan

Stefan J. Padfield, JD
Deputy Director
Free Enterprise Project
National Center for Public Policy Research
https://nationalcenter.org/ncppr/staff/stefan-padfield/

UBS Financial Services Inc.
1000 Harbor Blvd
3rd Floor
Weehawken, NJ 07086

ubs.com/fs

Confirmation

National Center for Public Policy Research
2005 Massachusetts Ave NW
Washinton, DC 20036

12/4/2023

Confirmation: Information regarding the account of The National Center for Public Policy Research

Dear Sir,

Please accept this letter as a confirmation of the following facts:

- During the month of October 2023, the National Center for Public Policy Research transferred assets, including 95 individual equity positions, from UBS Financial Services account [redacted] to Wells Fargo account [redacted].
- As part of this transfer UBS Financial Services transmitted cost basis data, including purchase date and purchase price, for each of these 95 equity positions transferred to Wells Fargo.
- UBS has reviewed a copy of the October 2023 Wells Fargo statement for account [redacted] and has confirmed the original purchase dates and purchase prices which were transmitted by UBS Financial Services to Wells Fargo are being accurately and correctly reported on this statement.

Questions
If you have any questions about this information, please contact the UBS Wealth Advice Center at [redacted].

Sincerely,

Evan Yeaw
Head Wealth Advice Center Operations
UBS Financial Services

January 10, 2024

Via Online Shareholder Proposal Form

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

Re: Johnson & Johnson No-Action Request for Shareholder Proposal by the National Center for Public Policy Research

Ladies and Gentlemen:

This correspondence is in response to the letter of Marc S. Gerber on behalf of Johnson & Johnson (the "Company" or "J&J") dated December 12, 2023, requesting that your office (the "Commission" or "Staff") take no action if the Company omits our shareholder proposal (the "Proposal") from its 2024 proxy materials for its 2024 annual shareholder meeting.

RESPONSE TO THE COMPANY'S CLAIMS

Our Proposal asks the Company to:

> [A]dopt a policy, and amend the bylaws as necessary, requiring Company directors to disclose their expected allocation of hours among all formal commitments set forth in the director's official bio. Allocation may be on a weekly, monthly, or annual basis. This policy would be phased in for the next election of directors in 2025.

The Company seeks to exclude the Proposal from the 2024 Proxy Materials pursuant to Rule 14a-8(b)(1) and Rule 14a-8(f)(1) because it claims Proponent failed to timely provide proof of the requisite stock ownership, and Rule 14a-8(i)(7) because it claims the subject matter of the Proposal directly concerns the Company's ordinary business operations.

Under Rule 14a-8(g), the Company bears the burden of persuading the Staff that it may omit our Proposal. The Company has failed to meet that burden.

Rule 14a-8(k) and Section E of Staff Legal Bulletin No. 14D (Nov. 7, 2008) provide that companies are required to send proponents a copy of any correspondence that they elect to submit to the Commission or the Staff. Accordingly, we remind the Company that if it were to submit correspondence to the Commission or the Staff or individual members thereof with respect to our Proposal or this proceeding, a copy of that correspondence should concurrently be furnished to us.

Background

The National Center for Public Policy Research ("Proponent" or "NCPPR") sent Johnson & Johnson the Proposal via FedEx on November 14, 2023. Johnson & Johnson subsequently received a letter from Wells Fargo Advisors dated November 20, 2023 (the "Wells Fargo Letter"). The Wells Fargo Letter stated that: "As of November 20, 2023, the National Center for Public Policy Research holds, and has held continuously since November 13, 2020 more than $2,000 of Johnson & Johnson common stock." Despite our provision of this proof-of-ownership letter that follows the usual forms and that provides the information required by the Staff as explicated in SLB 14L and elsewhere, on November 27, 2023, Johnson & Johnson sent a letter to the Proponent (the "Deficiency Letter") claiming that because Wells Fargo had not been the record holder of our stock for the entire period covered by the Wells Fargo Letter, we were required to provide additional documentation, though it failed to provide any reference to any SEC regulation, Staff rule or other guidance to indicate that proof-of-ownership letters from parties additional to the record holder of the relevant stock at the time of proposal submission had ever been required. By email dated December 5, 2023, Proponent advised J&J that "NCPPR's continuous stock ownership was established via the cost-basis data that was transferred by UBS to Wells Fargo when we established our account with Wells Fargo," noting that this information "routinely transfers when assets are transferred." Moreover, as a courtesy and in aid of setting to rest any legitimate, good faith doubt, we attached to the email a letter from UBS Financial Services dated December 4, 2023 (the "UBS Letter"), which confirmed that UBS was our prior record owner and had transferred our assets to Wells Fargo along with the relevant, and correct, cost basis data, as is the ordinary business practice.

Analysis

I. The Proponent Timely Provided Proof of the Requisite Stock Ownership

Johnson & Johnson ("J&J") argues it may exclude our Proposal because we did not satisfy the ownership requirements of Rule 14a-8(b). That rule requires in relevant part that we:

> [S]ubmit to the company a written statement from the "record" holder of your securities (usually a broker or bank) verifying that, at the time you submitted your proposal, you continuously held at least $2,000, $15,000, or $25,000 in market value of the company's securities entitled to vote on the proposal for at least three years, two years, or one year, respectively.[1]

We have satisfied our obligations under this rule by submitting a timely letter from Wells Fargo Advisors ("Wells Fargo Letter"), which J&J received November 22, 2023. J&J's arguments to the contrary are unavailing.

A. The Staff Has Established the Proof of Ownership That May Be Required of Proponents; it Does Not Include Any Communications from past Record Holders, and Such a Requirement May Not Now Be Invented and Retroactively Applied.

J&J's position finds no support in the text of Rule 14a-8(b). As we have just noted, the rule is that proponents must submit a statement from "the 'record' holder of [our] securities" confirming the relevant

[1] Rule 14a-8(b)(2)(ii)(A).

value of our ownership over the relevant period. Rule 14a-8(b) (emphasis added). It nowhere adds an additional obligation on proponents that they also provide redundant proof of ownership letters from *former* record holders of the stock – holders with whom the proponents presumably no longer have a business relationship and who therefore have neither motivation nor interest in writing such letters.

For the Staff suddenly to conjure such an additional obligation now – one that should have been included in the express terms of Rule 14a-8(b) if intended, or at least (if perhaps inappropriately) added as an additional requirement in a Staff Legal Bulletin for application after the issuance of such a bulletin – would provide a clear instance of the Staff acting not in fidelity to the rules that it and the Commission have developed, but in an arbitrary, capricious and *ex post* manner. We and others have argued in the past that such behavior is already impermissibly embedded in the no-action review process, and is one that grants the Staff an impermissible amount of opportunity for the application of bias on the basis of the personal policy preferences of the Staff.[2]

Such a decision would undermine the no-action review process in another fundamental way. In recent court filings SEC counsel has argued that the Commission's no-action review process, overseen by unelected and unappointed Staff members without much opportunity for Commissioner review and input, is within the statutory remit of the SEC despite there being no statutory language that either establishes or even hints at such a process.[3] SEC counsel, though, then pivots to say that while the review process is statutorily appropriate, it is so informal as to allow the Staff to issue decisions without explanatory opinions, or for any reliable route to meaningful review of the decisions to be available.[4] It makes this claim even though the SEC (and its Staff) appears never to have itself treated its no-action decisions as "informal," in that the SEC has never brought action against a company for having omitted a proposal after the Staff had issued a no-action letter. A reasonable response to these interlocking but contradictory claims is that the review process is not merely informal; it is *ulta vires*, with the Commission and its staffers not only illegally establishing this process but also themselves treating it not as informal but as binding on all parties and on itself, with rejected proponents facing no option but to incur the vast expense of litigation under often impossible time constraints. And then it compounds the improper nature of its unlawful proceedings by pretending that it treats its unauthorized procedures as informal to excuse the fact that it does not conduct these "informal" procedures with the rigor, regularity, and transparency required of government functions that *actually are authorized*.

This is, to err by delicacy, an attenuated argument that drags in its wake eye-catching implications, such as that if an agency makes up a power not granted to it and so not constrained by any statutory text, it can then apply that unlawful power without safeguards such as those established by the Administrative Procedures Act ("APA"), thereby freeing the unauthorized powers illegally seized by federal agencies to be wielded with the least constraint and therefore potentially for purposes the most inimical to our free republic of constrained and limited government. That is a position that may well give our judicial authorities pause, and perhaps be used as evidence that agencies really ought not to be trusted with any deference whatever in determining their own powers or the constraints on those powers.

Were the Staff to agree here with J&J it would illustrate the fundamental incoherency of the SEC's silently authorized (by the Securities Exchange Act)/statutorily unconstrained (by the APA), formal and

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[2] Brief for Petitioners at 31-32, Nat'l Ctr. for Pub. Pol'y Res. v. SEC, No. 23-60230 (5th Cir. July 14, 2023), ECF No. 62-1.
[3] Brief for SEC at 56-61, Nat'l Ctr. for Pub. Pol'y Res. v. SEC, No. 23-60230 (5th Cir. Sept. 13, 2023), ECF No. 79-1.
[4] Id. at 27-29.

final (as to practical effect)/informal and nonbinding (by nominal pretext) position. While the Staff requires shareholder proponents to provide proof of ownership letters from record holders to corporations, it has refused to require those record holders to provide the ownership letters to the proponents in the first instance. Apparently unauthorized powers not granted by statutory rescript can only run so far – far enough to constrain usually not-terribly-well-funded shareholders, but *not* to constrain giant banks and investment houses with large legal staffs and legal budgets, who might long ago have challenged the whole cobbled-together no-action process had the Staff made demands of them.

Among a variety of other problems, this half-way and certainly novel articulation of Staff authority effectively hands to record holders veto power over which proponents may file and which may not. As we have seen repeatedly in recent years, banks and investment houses have shown no shyness in making profound business decisions that appear explicable only as expressions of the personal policy preferences of the corporations' executives (or the executives of the corporations who act as stewards of other people's investments, but who arrogate to themselves the power of those clients' money to "force behaviors" that match their political and personal inclinations on companies their clients have invested heavily in).[5] While the Staff's unwillingness or incapacity to require record holders to issue ownership letters has resulted in proponents regularly facing an often frustrating and time-consuming process to get them, it is reasonable given background financial-industry-company behavior to expect that some record holder might refuse to issue proof of ownership letters because the company's executives (or whomever held the specific decision-making authority) objected to the concerns that animated the relevant shareholder proponent. In fact, we at NCPPR have significant reason to believe that it has already happened to us.

Were the Staff to take J&J's position, then it would have established that in the shareholder proposal submission process, (1) proponents must provide proof-of-ownership letters issued by parties that themselves have no obligation to issue such letters, giving the issuers arbitrary control over citizens' abilities to exercise statutorily or regulatory explicated civil rights; (2) proponents must also provide proof-of-ownership letters from *former* record holders for a period of years, thus depriving proponents who have been deprived by private issuers of civil rights on partisan grounds even the minimal self-help opportunity of switching record holders, as letters that the bad-acting initial record holder has already refused to provide will still be required *after* change of record holders; and that (3) this wholly arbitrary and unregulated private restriction on civil rights arises *even though there exists not the slightest legitimate concern that the proof-of-ownership letters issued by the new record holder lack even a soupcon of reliability*, as we will establish in the following section.

It would take some invention to come up with a decision that the Staff could reach that would more elegantly demonstrate systemic arbitrariness, capriciousness, potential for impermissible bias and the fundamental illegitimacy of the whole of the statutorily unauthorized no-action review process. Too, as a general matter, a regulatory agency that has the power to force A to provide a letter from B to C also

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[5] See, e.g., https://www.commerce.senate.gov/2023/9/sen-cruz-s-investigation-leads-intuit-to-end-discriminatory-policy-against-firearms-businesses ; https://www.dailysignal.com/2023/06/21/kentuckys-daniel-cameron-scores-win-threat-banks-cutting-conservatives/ ; https://www.breitbart.com/politics/2023/03/03/donald-trump-jr-wins-pnc-bank-reverses-course-blames-cutting-ties-mxm-news-good-faith-error/ ; https://www.washingtonexaminer.com/opinion/beltway-confidential/2748853/why-is-bank-of-america-canceling-the-accounts-of-religious-organizations/ ; https://www.zerohedge.com/markets/bank-america-other-companies-share-customer-records-fbi-without-warrant-all-time-director ; https://www.newsweek.com/stop-troubling-trend-politically-motivated-debanking-opinion-1787639.

enjoys the power to compel B to produce the letter in the first place. The Staff's tacit admission that the SEC lacks the authority to produce the proof-of-ownership letters *ab initio* appears to provide significant weight to the conclusion that despite its justificatory dance of the butterflies, it does not legally possess any of the powers that it wields in this process, and is in fact a wholly unwonted interloper in the shareholder-proposal process.

B. The Language in Proponent's Proof-Of-Ownership Letter Is Clear and Fully Evidences Our Requisite Minimum Ownership

J&J cites three no-action letters for the proposition that the SEC has permitted exclusion of a proposal where the proponent "failed to supply any evidence of eligibility."[6] Obviously, those letters are irrelevant here because we provided substantial evidence of eligibility.

J&J next argues that the Wells Fargo Letter "failed to provide sufficient evidence of the Proponent's eligibility."[7] However, the Wells Fargo Letter provided in relevant part that: "As of November 20, 2023, the National Center for Public Policy Research holds, and has held continuously since November 13, 2020 more than $2,000 of Johnson & Johnson common stock."[8] Wells Fargo could not and would not make such an affirmation without a sound basis for doing so, and of course it had such a basis. When investment accounts change hands between brokerages, the holdings are accompanied by "cost basis" information, information that includes both the date of purchase and the size of the initial purchase and any subsequent alterations. This information transfers in the ordinary course of business, and it did so in this case. The whole financial sector relies on this ordinary-course information transfer to be correct and trustworthy, and the federal government, particularly in aid of its taxing power, similarly relies on it.[9] J&J has provided no evidence, nor even a credible suggestion, that this normal-course information transfer either did not happen in this instance or that anything transpired to cast the slightest doubt on its effectiveness and veracity. And certainly, Wells Fargo would not have placed itself in danger of committing fraud by issuing its proof of ownership letters containing the relevant information if it had borne the slightest concern about the correctness of the cost-basis information it relied on, which had been received by it in the entirely expected manner in the ordinary course of business.

Except in specially articulated circumstances, shareholder proponents are not even permitted to inquire through the proposal process about corporate actions arising in the ordinary course of business. Here, J&J claims that it may refuse to rely upon information generated in the ordinary course of business, even if it can point to no evidence suggesting any irregularity of any kind in that regular business procedure or the merest sigh of doubt about the proper conduct of that business and the veracity of its product. And in fact, J&J persists in its increasingly meretricious position even in the face of an additional letter from UBS confirming, with regard to every single holding transferred from UBS to Wells Fargo, that the information that Wells Fargo now has, and relies on in its letters, is exactly the same as the information UBS maintained and then transferred to Wells Fargo.[10] This supplemental letter was in no way required

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[6] J&J's no-action request (Dec. 12, 2023) (emphasis added).
[7] Id.
[8] Wells Fargo Letter (Nov. 20, 2023).
[9] Cf. "The Cost Basis Reporting Service (CBRS) is an automated system that gives financial firms the ability to transfer customer cost basis information from one firm to another on any asset transfer." https://www.dtcc.com/clearing-services/equities-clearing-services/cbrs
[10] The file name for this letter, which was visible as part of the email sent to J&J, is "ACAT Cost Basis Confirmation Letter." The "Automated Customer Account Transfer Service (ACATS) is a system that automates and standardizes procedures for the transfer of assets in a customer account from one brokerage firm and/or bank to another." https://www.dtcc.com/clearing-services/equities-clearing-services/acats .

under Rule 14a-8(b), as we have seen, but we procured it for J&J in order to foreclose any possibility that J&J could in honestly retain any doubt about the correctness and completeness of the Wells Fargo proof-of-ownership letter. As the lacuna in its no-action letter reveal, we were successful in that attempt.

The Staff has previously noted that some companies "apply an overly technical reading of proof of ownership letters as a means to exclude a proposal," but that the Staff "generally do[es] not find arguments along these lines to be persuasive."[11] Specifically, "companies should not seek to exclude a shareholder proposal based on drafting variances in the proof of ownership letter if the language used in such letter is clear and sufficiently evidences the requisite minimum ownership requirements."[12] Here, J&J should have no honest doubt about our holding the appropriate amount of stock throughout the appropriate period in light of (1) the foregoing guidance, (2) the routine nature of the transfers J&J claims to be perplexed by, and (3) Wells Fargo's clear conclusion that we have held "continuously since November 13, 2020 more than $2,000 of Johnson & Johnson common stock."[13] Rather, J&J is simply asking the Staff to declare in contravention of the regulations and guidance governing this no-action process that we be bound by a never-before-articulated requirement to provide yet another piece of paper that it can add to the already complete, regular and inarguably trustworthy demonstration of proof of ownership "as a means to exclude a proposal."

In short, the Wells Fargo Letter itself fully satisfies our obligation under Rule 14a-8(b), and having fully satisfied our duty we then in the fullness of politesse provided another letter, this one indeed from UBS, confirming that no possibility of doubt about the propriety of our ownership as averred by Wells Fargo remained.

J&J nevertheless feigned a remnant of doubt because the Wells Fargo Letter "contained an ambiguous representation as to the Proponent's continuous ownership." This is simply false. Again, there is nothing ambiguous about Wells Fargo's representation that we hold and have held "continuously since November 13, 2020 more than $2,000 of Johnson & Johnson common stock." While J&J claims to have been thrown into confusion by the fact that our account with Wells Fargo was established within the past year, it is again difficult to take this claim seriously in light of the ubiquity of stock transfers – particularly given the sophistication of J&J and its counsel. Beyond that, the supplementary UBS letter to which J&J had no regulatory entitlement, as we have seen, only further undermines any claims to honest doubt. In addition to the confirmation that Wells Fargo's information was the same as UBS's, it essentially restated what is obvious from the Wells Fargo Letter: That we transferred stock to Wells Fargo and that Wells Fargo obtained the requisite cost basis information in connection with that transfer to affirm our relevant ownership, as is routine.

J&J's argument isn't merely empty of material import or good faith; it is fundamentally premised on suggesting that Wells Fargo and UBS are willing to risk their reputations and potentially additional grave consequences to help us to misstate our ownership, or at very least with reckless disregard about the veracity of their assurances about the size and nature of our holdings with them – which would be a particularly bad look for *two banks*. And in this very no-action request, as we will consider below, the Company had the temerity to make arguments based on the proposition that shareholder owners who are not involved in the day-to-day conduct of a business have no business wading into it, or doubting the averments of the Company employees who do know those ordinary business procedures intimately. Yet here it stands, brazenly insisting that the SEC Staff, on no grounds whatever, presume the unreliability of

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[11] SLB 14L.
[12] Id.
[13] Wells Fargo Letter (Nov. 20, 2023).

ordinary business procedures that are the whole root and core of a bank's business, which is transferring assets and the information about those assets correctly. If J&J, with no relationship to Wells Fargo and UBS in this context can, with no grounds for concern, pretend to doubt the efficacy of those ordinary business procedures so as to allow it to require proponents to provide additional heretofore unspecified pieces of paper that will add nothing whatever to the state of anyone's knowledge or the reliability of that knowledge, then *it* certainly has no business trying to stop stockholder of J&J – *owners of the Company* – from doubting absolutely every averment J&J makes about its ordinary business practices and procedures, and to make any proposals they want about any of it.

And, *ipso facto*, if the Staff concurs with J&J in this matter it will have, like J&J, adopted directly contradictory positions about the propriety of outsider intrusion into or distrust of ordinary business procedures, given their lack of intimate knowledge. And it would have adopted these directly contradictory positions as justification for weaving out of whole cloth and applying retroactively a new requirement implicitly foreclosed by the language of Rule 14a-8(b): that proponents provide a completely meaningless piece of paper not mentioned in the rule's language, from a business with which it likely no longer has a business relationship, which the Staff does not and presumably cannot require the business itself to provide, thereby allowing private parties to control government-granted civil rights according to their private lights.

The SEC by its Staff should not and truly cannot follow J&J into its tangle of pettifogging and contradiction. In addition to everything else, were the SEC to conclude that the Wells Fargo Letter here was insufficient proof of ownership, it would be undermining market efficiency, which includes myriad such transfers on a daily basis, thus violating the core mission of the SEC.

II. The Proposal Deals with Overboarding, Which Is an Issue the SEC Has Repeatedly Declined to Exclude as Ordinary Business.

J&J acknowledges "the Staff's view that the subject matter of overboarding limits relates to director qualifications and normally would not be excludable as ordinary business."[14] The analysis should stop there because there is nothing about our proposal that transforms it into anything other than a non-excludable proposal dealing with director qualifications. Again, J&J's arguments to the contrary are unavailing.

J&J tries to distinguish *American International Group, Inc.* (Mar. 6, 2013), which found non-excludable a proposal to limit directors to serving on three boards, by arguing that our proposal "goes far beyond analyzing or limiting the number of boards on which a director may serve."[15] The reality is precisely the opposite because asking directors to account for how they plan to allocate their time across commitments identified in their company bios is a far smaller encumbrance and imposition than limiting the number of boards on which they may serve. As we note in our proposal, by our count at least one of J&J's directors lists as many as 17 commitments in their bio. Asking how such a director plans to fit all those commitments into their schedule is an obvious question that likely no employer would ignore. Given that J&J's directors work for J&J's shareholders, the question is similarly obviously related to director qualifications. As a recent post on the *Harvard Law School Forum on Corporate Governance* put it: "As board responsibilities grow, so has the focus on director bandwidth; directors should be realistic about

[14] J&J's no-action request (Dec. 12, 2023) (citing *American International Group, Inc.* (Mar. 6, 2013)).
[15] Id.

their bandwidth when considering new opportunities for board service."[16] Accordingly: "Board roles that may require additional time, such as the board chair and audit committee chair, are now being taken into account when determining whether a director is overboarded."[17]

Nor does our proposal constitute micromanagement by "seeking extremely intricate detail and thereby probing too deeply into matters of a complex nature."[18] Making sure there are enough hours in the day to satisfy the commitments one is taking on is one of the most basic tasks of daily living. Either J&J's directors have already calendared their commitments to ensure they aren't over-extended, or they may be breaching their fiduciary duty to J&J, which requires them to have the time to be able to digest all material information necessary to do their job. Even if the allocation of hours is indeed a new exercise, there is nothing "extremely intricate" or "of a complex nature" involved. Perhaps the lawyers who prepared J&J's no-action request cannot imagine time accountings less tedious and granular than billable hours, but our Proposal is clearly not asking for anything like that. If a director doesn't even have a few minutes to ask an assistant to make some estimates of how much time they spend on each of their commitments over a relevant period, then that director has made too many commitments and has a sure duty to drop some of them – exposure of this being one of the benefits of our Proposal. If the effect of our Proposal is that a director of the Company or two are so wildly overstretched that they can't conduct this minimally time-consuming responsibility, and hence leaves the Company's board, absolutely all parties involved will benefit from that result.

The no-action letters J&J cites in support of its position might have some bearing, if the task that our Proposal asks directors and potential directors to perform were in any way onerous, but as it is not, they are not. Publishing the "written and oral content of any employee-training materials" offered to the company's employees,[19] or providing "detailed and current information regarding shareholder ownership of the company to the public and also provid[ing] a searchable history of this information"[20] are tasks simply not comparable to a simple request for an estimate of allocation of hours.

Notably, "specific methods, timelines, or detail do not necessarily amount to micromanagement and are not dispositive of excludability."[21] Put another way, "proposals seeking detail … do not per se constitute micromanagement."[22] Rather, the focus is "on the level of granularity sought in the proposal and whether and to what extent it inappropriately limits discretion of the board or management."[23] To that end, proposals seeking details do not constitute micromanagement when the level of detail sought is "consistent with that needed to enable investors to assess an issuer's impacts .., risks or other strategic matters appropriate for shareholder input."[24] Overboarding is certainly a matter appropriate for shareholder input.

Finally, J&J argues that the existence of internal and external policies dealing with overboarding should permit it to exclude our proposal. We note that J&J is not arguing that it has substantially implemented

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[16] Martin Lipton, *Thoughts for Boards: Key Issues in Corporate Governance for 2024*, HARVARD LAW SCHOOL FORUM ON CORPORATE GOVERNANCE (Jan. 3, 2024), https://corpgov.law.harvard.edu/2024/01/03/thoughts-for-boards-key-issues-in-corporate-governance-for-2024/ .
[17] Id .
[18] J&J's no-action request (Dec. 12, 2023).
[19] Id. (citing *Deere & Co.* (Jan. 3, 2022)).
[20] Id. (citing *GameStop Corp.* (Apr. 25, 2023)).
[21] SLB 14L.
[22] Id.
[23] Id.
[24] Id.

our proposal and cites no other precedent for such a rule. We assume that J&J and the various entities cited as part of this argument are happy with the status quo. But the relevant incentives of the "institutional investors, proxy advisory firms and companies" J&J cites should not be assumed to align perfectly with those of J&J's shareholders writ large. Concerns about overboarding include concerns about divided loyalties. Whether this proposal efficiently addresses those concerns is for the shareholders to decide.

Part III. Issuing relief to the Company would raise serious constitutional and administrative law concerns.

For the reasons discussed above, our proposal's merits under Commission and Staff rules, interpretations, guidance, and precedent require that Staff deny the Company's request for relief. If the Staff elects to issue relief to the Company despite its clear merits, the Staff's decision would raise a host of constitutional and administrative law issues.

A. The Company is asking the Staff to take arbitrary and capricious action under the Administrative Procedure Act.

If the Staff grants no-action relief to the Company for our proposal, it must explain how our proposal is distinct from prior overboarding disclosure proposals that it has blessed.[25]

Under the Administrative Procedure Act (APA), agency action that is "arbitrary and capricious" may be set aside.[26] The Supreme Court has succinctly explained that "[t]he APA's arbitrary and capricious standard requires that agency action be reasonable and reasonably explained."[27] Under this precedent, in order for action to be reasonable and reasonably explained, the agency must at least consider the record before it and rationally explain its decision.[28]

Additionally, where an agency seeks to change its position from a prior regime, it must "display awareness that it is changing position," "show that there are good reasons for the new policy" and provide an even "more detailed justification" when the "new policy rests upon factual findings that contradict those which underlay its prior policy," and "take[] into account" "reliance interests" on the prior policy.[29]

Given the Staff's prior precedent on overboarding, issuing relief to the Company would undoubtedly be a change in its position. At a bare minimum, the Staff—or the Commission—would have to explain its reasoning for the reversal in position to comply with the APA.

B. The Company is requesting relief the Staff lacks statutory authority to issue.

Regardless, the Staff lacks statutory authority to grant the Company no-action relief. The Company has notice that we intend to submit our proposal, which is valid under state law, for consideration at the annual meeting. The Staff may not give the company its blessing to exclude an otherwise valid proposal from its proxy statement.

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[25] See generally, *American International Group, Inc.* (Mar. 6, 2013).
[26] 5 U.S.C. § 706(2)(A).
[27] FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1158 (2021); see also Motor Vehicle Mfs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50 (1983).
[28] See FCC, 141 S. Ct. at 1160.
[29] FCC v. Fox Television Stations, Inc., 556 U.S. 502, 515 (2009).

Section 14(a) of the Exchange Act prohibits anyone from "solicit[ing] any proxy" "in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors."[30] While this authority might be read "broadly," "it is not seriously disputed that Congress's central concern [in enacting § 14(a)] was with disclosure."[31] The purpose of Section 14(a) was to ensure that investors had "adequate knowledge" about the "financial condition of the corporation . . . [and] the major questions of policy, which are decided at stockholders' meetings."[32]

While Section 14(a) gave the Commission authority to compel investor-useful disclosures, the substantive regulation of stockholder meetings was left to the "firmly established" state-law jurisdiction over corporate governance.[33] Recognizing that state law provides the "confining principle" to Section 14(a)'s otherwise "vague 'public interest' standard," the D.C. Circuit has held that "the Exchange Act cannot be understood to include regulation of" "the substantive allocation" of corporate governance that is "traditionally left to the states."[34] Under Section 14(a), then, the SEC may compel the disclosure in a company's proxy materials of items that will be before shareholders at the annual meeting.

Under state law, a shareholder proposal may be presented for consideration at the corporation's annual meeting if the proposal is a proper subject for action by the corporation's stockholders.[35] A proposal is a proper subject for action by stockholders if it is within the scope or reach of the stockholders' power to adopt.[36]

Our proposal is valid under state law. Under Section 14(a), the SEC only has power to compel that the Company disclose our proposal in its proxy materials. The Staff therefore may not then give the Company no-action relief to exclude it.

Conclusion

The Wells Fargo Letter is clear and sufficiently evidences the requisite minimum ownership requirements. Market efficiency would be undermined if additional proof of ownership were to be required from all prior record owners. Meanwhile, our overboarding Proposal deals with director qualifications, which is not a matter of ordinary business but rather is an issue for shareholders.

Accordingly, the Company has failed to meet its burden under Rule 14a-8(g) to exclude our Proposal. Therefore, based upon the analysis set forth above, we respectfully request that the Staff reject the Company's request for a no-action letter concerning our Proposal.

A copy of this correspondence has been timely provided to the Company. If we can provide additional materials to address any queries the Commission may have with respect to this letter, please do not hesitate to call us at (202) 507-6398 or email us at sshepard@nationalcenter.org and at spadfield@nationalcenter.org.

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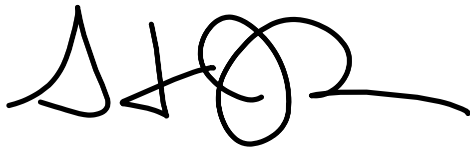
[30] 15 U.S.C. § 78n(a)(1).
[31] Bus. Roundtable v. SEC, 905 F.2d 406, 410 (D.C. Cir. 1990).
[32] S. Rep. No. 792 at 12 (1934).
[33] Bus. Roundtable, 905 F.2d at 413 (internal citation omitted).
[34] Id.
[35] See CA, Inc. v. AFSCME Emps. Pension Plan, 953 A.2d 227 (Del. 2008).
[36] Id. at 232.

Sincerely,

Scott Shepard
FEP Director
National Center for Public Policy Research



Stefan Padfield
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