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**NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.**

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January 30, 2019

**By Email to: [shareholderproposals@sec.gov](mailto:shareholderproposals@sec.gov)**

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's December 11, 2018, Rule 14a-8 Letter**

Ladies and Gentlemen:

On behalf of the North American Securities Administrators Association, Inc. ("NASAA"),<sup>1</sup> I am writing in reference to the December 11, 2018, letter from Johnson & Johnson's outside counsel (the "Johnson & Johnson Letter") requesting the Staff of the Division of Corporation Finance (the "Staff") of the U.S. Securities and Exchange Commission ("SEC") concur with Johnson & Johnson's view that the company may exclude a shareholder proposal submitted by The Doris Behr 2012 Irrevocable Trust (the "Proposal") from the company's 2019 proxy materials.<sup>2</sup> We agree that the Proposal should be excluded from the company's 2019 proxy materials. We have not consulted with the company or its legal counsel and are independently submitting this letter to share the reasons why we support rejection of the Proposal.

NASAA has long supported efforts to protect, and in some cases expand, the means by which harmed investors can recover losses. This includes advocating for measures that provide investors with choice in the dispute resolution process and against mandatory arbitration agreements in the securities industry. Investor confidence in fair and equitable markets is critical to the stability of the securities markets and long-term investments.<sup>3</sup> The Proposal precludes

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<sup>1</sup> Organized in 1919, NASAA is the oldest international organization devoted to investor protection. NASAA's membership consists of the securities administrators in the 50 states, the District of Columbia, Canada, Mexico, Puerto Rico, and the U.S. Virgin Islands. NASAA is the voice of securities agencies responsible for grass-roots investor protection and efficient capital formation.

<sup>2</sup> The Johnson & Johnson Letter is publicly available on the SEC's website at: <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2018/dorisbehr121118-14a8-incoming.pdf>.

<sup>3</sup> NASAA remains concerned with the widespread use of mandatory pre-dispute arbitration clauses in customer contracts used by broker-dealers and, most recently, investment advisers. NASAA believes that investors must have a choice of forum when it comes to resolving disputes with their investment professionals. *See, e.g.,* Letter from

choice of forum in an even more draconian way, as it would also bar defrauded investors' rights to class action and appeal remedies.

As outlined in the Johnson & Johnson Letter, the Proposal would require the company to put to shareholder vote a resolution that the company's Board of Directors should "take all practicable steps to adopt a mandatory arbitration bylaw" amendment to the company's bylaws.<sup>4</sup> This putative bylaw amendment would require that any future disputes between shareholders and the company under the federal securities laws be brought in an arbitral forum and not in federal court. The Proposal would furthermore require that "any disputes subject to arbitration may not be brought as a class and may not be consolidated or joined" and that the results of the arbitration proceedings be final and unappealable.<sup>5</sup>

The company has rightfully sought to exclude this drastic and misguided Proposal from its 2019 proxy materials because the Proposal would cause the company to violate federal law.<sup>6</sup> Specifically, as the Johnson & Johnson Letter outlines, the Proposal is incompatible with the anti-waiver provisions in Section 29(a) of the Securities Exchange Act of 1934 (the "Exchange Act") because the Proposal would cause shareholders to lose substantive rights under the Exchange Act, namely their right to bring Section 10(b) claims as a class action and subject to appellate review by a court of law.<sup>7</sup> We would note further, though, that the Proposal also would cause the company to violate the anti-waiver provisions in Section 14 of the Securities Act of 1933 (the "Securities Act").<sup>8</sup> Although the Johnson & Johnson Letter does not discuss this companion anti-waiver provision to Section 29(a), the Proposal is written broadly and would apply to all claims "under federal securities laws in connection with the purchase or sale of any securities issued by the Corporation."<sup>9</sup> The Proposal thus would also deny shareholders

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NASAA President Mike Rothman to Hon. Keith Ellison (Jan. 30, 2017), available at <http://www.nasaa.org/wp-content/uploads/2013/10/NASAA-letter-to-Rep.-Keith-Ellison-Re-Investor-Choice-Act-of-2017.pdf>; Letter from NASAA President William Beatty to Hon. Keith Ellison (Feb. 26, 2015), available at <http://www.nasaa.org/wp-content/uploads/2015/02/NASAA-Letter-in-Support-of-Investor-Choice-Act-of-2015-FINAL-2-26-2015.pdf>. The Proposal's underlying policy aims raise similar concerns for NASAA as do restricting investor choice for broker-dealer customers and investment adviser clients.

<sup>4</sup> See Johnson & Johnson Letter, *supra* note 2, at 2.

<sup>5</sup> See *id.*

<sup>6</sup> The Proposal is also likely prohibited by state corporate laws as well. The Delaware Chancery Court recently held in *Sciabacucchi v. Salzberg*, Case No. 2017-0931-JTL, slip op. (Del. Ch. Dec. 19, 2018), that Delaware corporate law does not permit a company chartered in the state to include in its governing corporate documents a requirement that all shareholder claims under the Securities Act of 1933 be filed in federal court. (Section 22 of the Securities Act of course allows claims under the title to be brought in federal or state courts.) Under *Sciabacucchi*, therefore, a corporate forum selection provision – such as a mandatory arbitration clause – that impairs shareholders' ability to pursue their statutory remedies under the federal securities laws is void under Delaware law.

<sup>7</sup> See Johnson & Johnson Letter, *supra* note 2, at 3-4.

<sup>8</sup> 15 U.S.C. § 77n.

<sup>9</sup> See Johnson & Johnson Letter, *supra* note 2, at 2.

substantive rights to bring potential claims against the company under Section 11<sup>10</sup> or Section 12<sup>11</sup> of the Securities Act.

In addition, we note that state securities laws also routinely include anti-waiver provisions similar to those under the federal securities laws. For example, anti-waiver provisions were written-in as Section 410(d)(i) of the Uniform Securities Act of 1956<sup>12</sup> and as Section 509(l) of the Uniform Securities Act of 2002.<sup>13</sup> To the extent the Proposal was interpreted as applying to state securities laws, it would violate those laws as well.

The Johnson & Johnson Letter additionally reminds the Staff of the SEC's longstanding animosity to mandatory arbitration provisions.<sup>14</sup> The Staff has a history of resisting issuers' attempts to include mandatory arbitration clauses in their governing corporate documents.<sup>15</sup> We ardently agree that mandatory arbitration is bad public policy and the Staff should not now change course on its well-placed position. In fact, Chairman Clayton explained to Congress that he sees no need to revisit this well-settled issue.<sup>16</sup>

Forcing investors into mandatory arbitration of shareholder/issuer disputes or otherwise precluding investors from joining class actions is bad policy because it would harm retail investors and be disruptive to the marketplace. The Supreme Court has "long recognized" that securities class action litigation is "an essential supplement" to the enforcement powers of federal and state regulators.<sup>17</sup> Congress also considers private rights of action to be an indispensable tool for investors.<sup>18</sup> Put simply, the SEC and state securities regulators do not possess unlimited resources and cannot combat all securities fraud entirely on their own. Securities class actions serve as a deterrent to violative conduct and are furthermore a primary mechanism by which investors are compensated for the misconduct of fraudsters. While funds recovered by federal and state regulators can be returned to investors, such as through an SEC

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<sup>10</sup> 15 U.S.C. § 77k.

<sup>11</sup> 15 U.S.C. § 77l.

<sup>12</sup> Section 410(d)(i) states: "Any condition, stipulation, or provision binding any person acquiring any security or receiving any investment advice to waive compliance with any provision of this act or any rule or order hereunder is void."

<sup>13</sup> Section 509(l) states: "A condition, stipulation, or provision binding a person purchasing or selling a security or receiving investment advice to waive compliance with this Act or a rule adopted or order issued under this Act is void."

<sup>14</sup> See Johnson & Johnson Letter, *supra* note 2, at 5-6.

<sup>15</sup> See, e.g., Kevin Roose, *Carlyle Drops Arbitration Clause from I.P.O. Plans*, DealBook (Feb. 3, 2012), available at: <https://dealbook.nytimes.com/2012/02/03/carlyle-drops-arbitration-clause-from-i-p-o-plans/>.

<sup>16</sup> See Letter from Chairman Jay Clayton to The Honorable Carolyn B. Maloney (Apr. 24, 2018), available at <https://maloney.house.gov/sites/maloney.house.gov/files/MALONEY%20EJT%20AL%20-%20FORCED%20ARBITRATION%20-%20ES156546%20Response.pdf>; Transcript of Senate Banking, Housing and Urban Affairs Committee Hearing on Virtual Currencies, SEC and CFTC Oversight (Feb. 6, 2018) (Chairman Clayton, stating in part, "I can't dictate whether this issue comes before us or not, because of the way it has come before the SEC in the past. But I'm not anxious to see a change in this area.").

<sup>17</sup> *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007).

<sup>18</sup> See, e.g., S. Rep. No. 104-98 (June 19, 1995), reprinted at 1995 U.S.C.C.A.N. 679.

fair fund or a court appointed receiver, these amounts have historically paled in comparison to the amounts recovered directly by investors.<sup>19</sup>

Shareholder class action litigation also serves an important role in maintaining investor confidence and supporting an efficient capital market system. Class action litigation is the primary means of upholding securities disclosure standards and contributes materially to the development of the common law. In contrast, arbitrators can deviate from the law, their opinions may be unexplained, and their decisions are essentially unreviewable<sup>20</sup> even when they are not expressly made so such as through the Proposal.<sup>21</sup> What is more, basic questions of shareholder rights are foundational “rules of the game” issues that should be kept uniform across publicly-traded companies. To require that investors research every issuer’s articles of incorporation and bylaws to know what their rights are vis-à-vis the company would be grossly inefficient and contrary to investors’ reasonable expectations when making investment decisions.

For all these reasons, we support the Johnson & Johnson Letter and ask that the Staff respond to the company by confirming it would not recommend enforcement action if the company excludes the Proposal from its 2019 proxy materials.

Thank you for considering our views on this important issue and we look forward to working with you in our shared mission to protect investors.

Sincerely,



Michael Pieciak  
NASAA President  
Commissioner, Vermont Department of  
Financial Regulation

Copy: The Honorable Jay Clayton  
Chairman, U.S. Securities Exchange Commission

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<sup>19</sup> See John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and its Implementation*, 106 Colum. L. Rev. 1534, 1542-43 (2006).

<sup>20</sup> See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011).

<sup>21</sup> See *supra* note 4 and accompanying text.