Council of Institutional Investors®
The voice of corporate governance

Via Hand Delivery

January 31, 2019

The Honorable Jay Clayton
Chairman
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Dear Chairman Clayton:

I am writing on behalf of the Council of Institutional Investors (CII). CII is a nonprofit, nonpartisan association of public, corporate and union employee benefit funds, other employee benefit plans, state and local entities charged with investing public assets, and foundations and endowments with combined assets under management exceeding $4 trillion. Our member funds include major long-term shareowners with a duty to protect the retirement savings of millions of workers and their families. Our associate members include a range of asset managers with more than $25 trillion in assets under management.[1]

On November 9, 2018, Hal Scott, Trustee of The Doris Behr 2012 Irrevocable Trust, submitted a proposal for the consideration and vote of shareholders at the 2019 annual meeting of Johnson & Johnson (J&J).[2] The proposal requests that "the Board of Directors [of J&J] take all practicable steps to adopt a mandatory arbitration bylaw."[3] In response, by letter of December 11, 2018, counsel for J&J requested that the staff of the Division of Corporation Finance of the U.S. Securities and Exchange Commission (SEC or Commission) concur with J&J's view that it may exclude the shareholder proposal submitted by Mr. Scott from J&J's proxy materials pursuant to Rule 14a-8(i)(2)[4] because implementation of the proposal would cause J&J to violate federal law.[5]

[1] For more information about the Council of Institutional Investors ("CII"), including its board and members, please visit CII's website at http://www.cii.org.
[2] Letter from Hal Scott, Trustee, The Doris Behr 2012 Irrevocable Trust to Mr. Thomas J. Spellman III, Assistant General Counsel and Corporate Secretary, Johnson & Johnson (Nov. 9, 2018), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2018/dorisbehr121118-14a8-incoming.pdf.
[3] *Id.* (attachment).
[4] Shareholder Proposals, 17 C.F.R. § 14a-8(i)(2) (as amended Sept. 16, 2010) (a company may exclude a proposal if "the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject"), *available at* https://www.law.cornell.edu/cfr/text/17/240.14a-8.
[5] Letter from Marc S. Gerber, Skadden, Arps, Slate, Meagher & Flom LLP to U.S. Securities and Exchange Commission, Division of Corporation Finance, Office of Chief Counsel 3 (Dec. 11, 2018), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2018/dorisbehr121118-14a8-incoming.pdf.

We respectfully request that the SEC grant J&J no-action relief consistent with prior no-action positions,[6] and the SEC's long-held view that including shareowner arbitration clauses in the governing documents of U.S. public companies is contrary to public policy.[7]

As you may recall from your participation at our spring 2018 conference, many CII members strongly oppose shareowner arbitration clauses between U.S. public companies and investors. Our long-standing membership approved policy addressing this issue states: "[C]ompanies [should not] attempt to bar shareowners from the courts through the introduction of forced arbitration clauses."[8]

Our policy is based on the view that shareowner arbitration clauses in public company governing documents represent a potential threat to principles of sound corporate governance that balance the rights of shareowners against the responsibility of corporate managers to run the business.[9] More specifically, among the many problems that our members have identified with shareowner arbitration clauses is the fact that disputes that go to arbitration rather than the court system generally do not become part of the public record and, thereby, may lose their deterrent effect.[10] As Hillary Sale, a law professor at Georgetown University recently commented: Because

---

[6] *See* Gannett Co., Inc., SEC No-Action Letter (Feb. 22, 2012) (permitting Gannett to omit a proposal from its proxy materials in reliance on rule 14a-8(i)(2) that would amend its bylaws to provide that certain controversies or claims, including those arising under the federal securities laws, shall be settled by arbitration), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2012/2donaldvuchetich022212-14a8.pdf; Pfizer Inc., SEC No-Action Letter (Feb. 22, 2012) (permitting Pfizer to omit a proposal from its proxy materials in reliance on rule 14a-8(i)(2) that would amend its bylaws to provide that certain controversies or claims, including those arising under the federal securities laws, shall be settled by arbitration), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2012/donaldvuchetich022212-14a8.pdf.

[7] *See* Thomas L. Riesenberg, Commentary, Arbitration and Corporate Governance: A Reply to Carl Schneider, 4 Insights 8 (Aug. 1990) (indicating that it would "be contrary to the public interest to require investors who want to participate in the nation's equity markets to waive access to a judicial forum for vindication of federal or state law rights, where such waiver is made through a corporate charter rather than an individual investor's decision"); *cf.* Alison Frankel, A Delaware Death Blow for Mandatory Shareholder Arbitration, Reuters, Dec. 19, 2018 (commenting on a recent decision by Vice-Chancellor Travis Laster of the Delaware Chancery Court, in the case of Sciabacucchi v. Salzberg, et. al., C.A. No. 2017-0931 (Del. Ch. Dec. 19, 2018), that may prevent Delaware corporations from effecting "mandatory shareholder litigation of federal securities claims though corporate charters or bylaws, regardless of what the Securities and Exchange Commission has to say about the issue"), https://www.reuters.com/article/us-otc-forumselection/a-delaware-death-blow-for-mandatory-shareholder-arbitration-idUSKCN1OI2HB.

[8] Council of Institutional Investors, Corporate Governance Policies § 1.9 Judicial Forum (updated Oct. 24, 2018), https://www.cii.org/files/10_24_18_corp_gov_policies.pdf.

[9] *See, e.g.*, Letter from Jeff Mahoney, General Counsel, Council of Institutional Investors to Keith F. Higgins, Director, Division of Corporation Finance, U.S. Securities and Exchange Commission, et al. 1 (Dec. 11, 2013), https://www.cii.org/files/issues_and_advocacy/correspondence/2013/12_11_13_CII_letter_to_SEC_forced_arbitration.pdf; *cf.* Letter from State Financial Officers Foundation to Chairman Clayton (Nov. 13, 2018) (setting forth four "specific concerns in allowing companies to impose forced arbitration clauses that limit class action claims on investors"), https://secureoursavings.com/wp-content/uploads/2018/11/SFOF-Letter-to-SEC-Chairman-Clayton-1.pdf.

[10] *See, e.g.*, Letter from Jeffrey P. Mahoney, General Counsel, Council of Institutional Investors to Mr. Craig S. Phillips, Counselor to the Secretary, U.S. Department of Treasury 8 (Aug. 23, 2017), https://www.cii.org/files/August%2023%202017%20Letter%20to%20Treasury%20v3.pdf.

arbitration is private, "[w]e won't have a good understanding of when companies are committing fraud or in fact behaving in an above-board manner."[11]

We also agree with SEC Commissioner Robert J. Jackson, Jr, that the existence of private shareowner actions is a necessary supplement to the Commission's limited enforcement resources.[12] Those actions aid the SEC in identifying and addressing corporate wrongdoing and poor corporate governance practices, and decisions by courts in private actions have developed much of the law governing securities fraud.[13]

As you may also recall from your participation at CII's spring 2018 conference, you indicated that the SEC's long-standing view on shareowner arbitration clauses in the context of a U.S. company's initial public offering registration statement would not be changed without a "fair" process that included "input from all interested constituents."[14] Similar assurances were subsequently provided in writing to the Honorable Carolyn B. Maloney of the U.S. House of Representatives.[15]

In sum, consistent with CII membership approved policies described above, we strongly support the J&J request for no-action relief.

. . . .

[11] Dave Michaels, Johnson & Johnson Drafted Into Fight Over Shareholder Lawsuits, Wall St. J., Dec. 13, 2018, https://on.wsj.com/2EAZGnY; *see* N. Peter Rasmussen, Corporate Transactions Blog, Mandatory Arbitration Proposal Creates Strange Bedfellows, Bloomberg L. (Jan. 8, 2019) (quoting Securities and Exchange Commission Commissioner Robert J. Jackson, Jr. that "as compared to closed-door arbitration proceedings, 'a public hearing gives judges a chance to tell corporate insiders what the law expects of them'"), https://www.bna.com/mandatory-arbitration-proposal-b57982095134/; *cf.* Carol V. Gilden, Partner, Cohen Milstein, A Clear and Present Danger: The Continued Threat of Forced Arbitration, Shareholder Advoc. 5 (Winter 2019) (quoting James D. Cox, Professor of Law, Duke Law School: '"In the classic work, *Democracy in America*, Alexis de Tocqueville wrote nearly 200 years ago that a central strength of the democracy in America was our country's commitment to access to justice through mechanisms such as . . . making the courts available for everyone [and] [m]andated arbitration of investor and shareholder claims would be a grave departure from what makes America exceptional.'"), https://www.cohenmilstein.com/sites/default/files/A%20Clear%20and%20Present%20Danger.pdf.

[12] *See* N. Peter Rasmussen; *see, e.g.*, Brief Amici Curiae of the Council of Institutional Investors et al. at 6, Halliburton Co. v. Erica P. John Fund, Inc., No. 13-317 (U.S. 2014) (quoting Securities and Exchange Commission Chairman Arthur Levitt, Jr. that '"[p]rivate rights of action are not only fundamental to the success of our securities markets, they are an *essential complement* to the SEC's own enforcement program'"), https://www.cii.org/files/issues_and_advocacy/legal_issues/02_05_14_CII_amicus_curiae_brief_halliburton.pdf.

[13] *See* N. Peter Rasmussen; *see also* Letter from Michael Pieciak, NASAA President, Commissioner, Vermont Department of Financial Regulation to the U.S. Securities and Exchange Commission 4 (Jan. 30, 2019) ("Class action litigation . . . contributes materially to the development of the common law.") (on file with CII).

[14] Council of Institutional Investors, Spring 2018 Meeting, Plenary 1: Interview with the SEC Chair (Mar. 12, 2018), https://www.youtube.com/watch?v=CV7rb-b4sEM.

[15] Letter from Jay Clayton, Chairman, United States Securities and Exchange Commission to The Honorable Carolyn B. Maloney, U.S. House of Representatives 2 (Apr. 24, 2018) ("I would expect that any decision would involve Commission action (and not be made through delegated authority) and that the Commission would give the issue full consideration in a measured and deliberative manner."), https://maloney.house.gov/sites/maloney.house.gov/files/MALONEY%20ET%20AL%20-%20FORCED%20ARBITRATION%20-%20ES156546%20Response.pdf.

Thank you for your consideration of our views on this important matter. If you have any questions regarding this letter, please feel free to contact me directly at 202-261-7081 or jeff@cii.org.

Sincerely,

Jeffrey P. Mahoney
General Counsel

cc: The Honorable Commissioner Robert J. Jackson, Jr., U.S. Securities and Exchange Commission

The Honorable Commissioner Hester M. Peirce, U.S. Securities and Exchange Commission

The Honorable Commissioner Elad L. Roisman, U.S. Securities and Exchange Commission

Mr. William H. Hinman, Director, Division of Corporation Finance, U.S. Securities and Exchange Commission