

Johnson & Johnson May Exclude Shareholder Proposal for Binding Arbitration on Securities Claims

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by Cam C. Hoang

On February 11, 2019, the Staff of the Division of Corporation Finance granted no-action relief permitting Johnson & Johnson to omit a shareholder proposal from its proxy statement. The shareholder proposal requested mandatory arbitration of shareholder claims arising under the federal securities laws.

The Staff relied on Rule 14a-8(i)(2), which permits exclusion of a proposal that, if implemented, would cause the company to violate any state, federal or foreign law to which it is subject. Johnson & Johnson argued that the proposal, if implemented, would result in a violation of both federal and state law, but the SEC granted no-action relief specifically on the basis of state law. Among the company's submissions, the Staff recognized of the legal authority of the New Jersey Attorney General, who issued an opinion that implementation of the proposal would result in a New Jersey state law violation.

The decision was sufficiently significant that SEC Chair Jay Clayton issued an accompanying statement, noting that mandatory arbitration provisions have garnered a great deal of attention, and that it is a complex matter requiring careful consideration.

Chairman Clayton supported the Staff's recommendation, citing the New Jersey Attorney General's submission. Chairman Clayton also agreed with the Staff's decision not to address the legality of mandatory shareholder arbitration under federal securities laws, and he expressed the view that any SEC policy decision on this subject should be made by the Commission instead of the Staff.

Rule 14a-8(i)(2) permits the exclusion of shareholder proposals that would result in a violation of any state, federal or foreign law, including but not limited to corporate and securities laws. Other examples where the Rule 14a-8(i)(2) exception has been successfully invoked include a written consent proposal that violated state laws requiring unanimous shareholder written consent (*Lowe's Companies* (March 10, 2011)) and a proposal to amend governing documents to require that at least 50% of board nominees

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shall be minorities (*Safeway Inc.* (March 28, 2005)).

As with Rule 14a-8(i)(1), which permits exclusion of proposals that are not proper subjects for shareholder action, the company must provide a supporting opinion of counsel when the basis for exclusion is a matter of state or foreign law, and in cases involving Delaware law, the Staff may request a legal interpretation from the Delaware Supreme Court. The Staff will permit proponents to convert mandatory proposals into precatory proposals if the mandatory nature of the proposal creates the potential violation.