Securities Regulation Daily Wrap Up, PROXIES—NASAA opposes Johnson & Johnson shareholders' mandatory arbitration proposal, (Jan. 31, 2019)

Securities Regulation Daily Wrap Up

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By Jay Fishman, J.D.

NASAA agrees with Johnson & Johnson that including a shareholder proposal for mandatory arbitration in the company's 2019 proxy materials would be draconian for investors.

The North American Securities Administrator Association's (NASAA) current President and Vermont's Financial Regulation Commissioner, Michael Pieciak, in a letter to the SEC Corporation Finance Division's Office of Chief Counsel, emphasized his agreement with Johnson & Johnson Company's outside counsel that a shareholder proposal advocating mandatory arbitration for future shareholder disputes be excluded from the company's 2019 proxy materials. Moreover, he asked the SEC staff to confirm that it would not take enforcement action against the company if it excludes the proposal from its 2019 proxy materials.

NASAA's reasons for opposing the proposal. On NASAA's behalf, Pieciak proclaimed that permitting mandatory arbitration to decide future disputes would contradict Commission Chair Jay Clayton's statement to Congress that allowing the courts rather than mandatory arbitration to decide shareholder disputes is well-settled SEC policy that does not need revisiting. Pieciak added that allowing mandatory arbitration would do away with shareholder class action litigation which the Supreme Court has long recognized as an essential supplement to federal and state regulators' powers, and that Congress too considers private rights of action to be an indispensable tool for investors. Pieciak lastly declared that the proposal would:

- violate the federal Exchange Act, Section 29(a) anti-waiver provisions by prohibiting shareholders from bringing Section 10(b) class action claims;
- violate the federal Securities Act, Section 14 anti-waiver provisions by prohibiting shareholders from bringing *any* claims under federal securities laws in connection with the purchase or sale of any corporation-issued security; and
- violate the states' Uniform Securities Acts of 1956 and 2002 anti-waiver provisions.

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