

[Securities Regulation Daily Wrap Up, PROXIES—Institutional investors group joins in opposition to Johnson & Johnson mandatory arbitration shareholder proposal, \(Feb. 4, 2019\)](#)

Securities Regulation Daily Wrap Up

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According to CII, a mandatory arbitration bylaw is contrary to the SEC's long-held position against mandatory shareholder arbitration and any reconsideration should be subject to input from all constituents and not through the proxy process.

The Council of Institutional Investors (CII) has written to the SEC in opposition to a shareholder proposal that would request the board of Johnson & Johnson (J&J) to adopt a bylaw requiring arbitration of shareholder claims. CII joins NASAA in supporting the company's position that the proposal should be excluded from the proxy materials for J&J's upcoming annual meeting of shareholders.

Proposal. Johnson & Johnson shareholder Hal Scott submitted a proposal to be voted on at J&J's 2019 shareholder meeting requesting that J&J's board of directors "take all practicable steps to adopt a mandatory arbitration bylaw." J&J submitted a letter to the SEC's Division of Corporation Finance requesting that it be allowed to exclude the proposal from its proxy materials. In the company's view, if implemented, Scott's proposal would cause the company to violate federal law.

CII letter. CII's [letter](#) to CorpFin urges the Division to grant the no-action relief requested by J&J. According to CII, shareholder arbitration clauses in public company governing documents are against the principles of sound corporate governance because when disputes go to arbitration instead of the court system, they are not part of the public record and can lose their deterrent effect.

CII also cited the SEC's longstanding view opposing shareholder arbitration clauses in U.S. IPO registration statements and noted that Chairman Jay Clayton stated at CII's Spring 2018 meeting that this policy should not be changed without input from all interested constituents. In addition, CII also referenced Chairman Clayton's letter to [Rep. Carolyn Maloney](#) (D-NY) in April 2018, in which he [stated](#) that he would expect prior to any decision on the matter, the SEC would "give the issue full consideration and in a measured and deliberative measure" and not through delegated authority.

In its letter, CII referenced [remarks](#) made by SEC Commissioner Robert Jackson, who has expressed skepticism about permitting companies to include mandatory shareholder arbitration clauses in IPO documents. Jackson has stated that private shareholder actions against companies aid the SEC in identifying and addressing corporate wrongdoing. Much of the law governing securities fraud has developed out of this kind of litigation and has supplemented the SEC's limited enforcement resources, Jackson has advised.

NASAA also rejects mandatory arbitration. CII joins the North American Securities Administrators Association (NASAA) in [calling for](#) the SEC to permit the exclusion of Scott's proposal from J&J's proxy materials. Describing the proposal as "drastic and misguided," NASAA advised that the proposal would be incompatible with the anti-waiver provisions of the Exchange Act because it would interfere with shareholder rights to right to bring a Section 10(b) class action lawsuit in federal court, as well as lawsuits under Sections 11 and 12 of the Securities Act.

Companies: Council of Institutional Investors; North American Securities Administrators Association, Inc.; Johnson & Johnson

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