

[Securities Regulation Daily Wrap Up, TOP STORY—CorpFin says Johnson & Johnson can exclude shareholder proposal on mandatory arbitration, \(Feb. 11, 2019\)](#)

Securities Regulation Daily Wrap Up

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By [Mark S. Nelson, J.D.](#)

Chairman Clayton acknowledged the complexity of the mandatory arbitration issue in a separate statement noting the propriety of CorpFin's staff view that the company could exclude the proposal.

The SEC's Division of Corporation Finance issued a response to a request by Johnson & Johnson to exclude a shareholder proposal asking the company to adopt a bylaw imposing mandatory arbitration for disputes between the company and its shareholders. The company had argued that the proposal, if adopted, could cause the company to violate the law of New Jersey, where the company is incorporated. The CorpFin response, however, was carefully drafted to avoid answering certain specific legal questions.

New Jersey AG letter key. The CorpFin [response letter](#) concluded that Johnson & Johnson could exclude the shareholder proposal under Exchange Act Rule 14a-8(i)(2). Division staff explained its rationale, which relied heavily on an opinion by the New Jersey attorney general:

"When parties in a rule 14a-8(i)(2) matter have differing views about the application of state law, we consider authoritative views expressed by state officials. Here, the Attorney General of the State of New Jersey, the state's chief legal officer, wrote a letter to the Division stating that 'the Proposal, if adopted, would cause Johnson & Johnson to violate New Jersey state law.' We view this submission as a legally authoritative statement that we are not in a position to question," said the Division staff.

Moreover, the Division staff noted that it was looking to the authority of the New Jersey attorney general without making an assessment of whether the attorney general's view correctly interpreted that state's law. Division staff also said that it was not "approving" or "disapproving" either the "substance" or "legality" of the shareholder proposal submitted to Johnson & Johnson, nor was the staff opining on the applicability of federal law to the proposal. The staff further observed that the parties involved could seek a court determination of the matter.

Prior to the CorpFin response, several investor groups had written to the SEC in opposition to the shareholder proposal and in favor of Johnson & Johnson's ability to exclude the proposal. Those groups included the Council of Institutional Investors, which [objected](#) on public policy grounds, citing previous SEC policy remarks. The North American Securities Administrators Association also [wrote](#) to the SEC that such proposals could severely impact investors' rights.

Statement by Chairman Clayton. Chairman Clayton issued a [statement](#) in which he reiterated his prior comments on whether the SEC could approve such a proposal if presented with it in the form of a registration statement. "... In response to these inquiries, I stated that, if the issue were to arise in an actual initial public offering of a domestic company, it would not be appropriate for resolution at the staff level but would rather be best addressed in a measured and deliberative manner by the Commission."

In the context of the Johnson & Johnson proposal, which arose instead under Exchange Act Rule 14a-8, Clayton said: "In light of the submissions, and in particular the letter of the Attorney General of New Jersey, I believe the approach taken by the staff—to not recommend enforcement action in this complex matter of state law—is appropriate."

Clayton also reiterated that staff views are not legally binding. He said he remains committed to the notion that the issue of mandatory arbitration should be addressed by the Commission as part of its policymaking function.

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

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