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January 29, 2019

Via Email to: shareholderproposals@sec.gov
U.S. Securities and Exchange Commission
Division of Corporation Finance
Office of Chief Counsel
100 F Street
Washington, DC 20549

Re: Johnson & Johnson – 2019 Annual Meeting – Omission of Shareholder Proposal of The Doris Behr 2012 Irrevocable Trust

Ladies and Gentlemen:

I write, as the Attorney General of the State of New Jersey, in support of the request by Johnson & Johnson that the staff of the U.S. Securities and Exchange Commission concur that the company may exclude from its 2019 proxy materials a shareholder proposal and supporting statement ("Proposal") submitted by the Doris Behr 2012 Irrevocable Trust. Johnson & Johnson, a New Jersey corporation, made its request for such a "no-action" letter in correspondence dated December 11, 2018, and submitted pursuant to Rule 14a-8(j).

The Proposal includes a resolution requesting that the company's "Board of Directors take all practicable steps to adopt a mandatory arbitration bylaw" governing "disputes between a stockholder and the Corporation and/or its directors, officers or controlling persons relating to claims under federal securities laws in connection with the purchase or sale of any securities issued by the Corporation." In addition to stating that such disputes shall be "exclusively and finally settled by arbitration," the proposed bylaw would provide, among other things, that "any disputes subject to arbitration may not be brought as a class and may not be consolidated or joined."

Johnson & Johnson's correspondence explains that the Proposal may be excluded from the company's proxy materials under Rule 14a-8(i)(2) because "the adoption of a bylaw as described in the Proposal would be contrary to the public policy interests underlying the federal securities laws and would cause Johnson & Johnson to violate federal law." I agree that the Proposal would be contrary to the public policy interests underlying the federal securities laws, and that it would seriously undermine the goals of investor protection and transparency on the part of those who issue and sell securities. I write separately, however, to advise the Commission that the Proposal is also excludable under Rule 14a-8(i)(2) for the additional reason that adoption of the proposed bylaw would cause Johnson & Johnson to violate applicable *state* law.

Longstanding principles of New Jersey law limit the subject matter of corporate bylaws to matters of internal concern to the corporation. Under New Jersey law, as under Delaware law, forum-selection provisions relating to claims under the federal securities laws do not address matters of internal concern, and bylaw provisions purporting to dictate the forum for such claims—including but not limited to mandatory arbitration provisions—are void. This conclusion is reinforced by recent amendments to the New Jersey Business Corporation Act ("NJBCA"), N.J.S.A. §§ 14A:1-1 *et seq.*, which specifically address forum-selection bylaws and do not authorize forum-selection bylaws relating to federal securities law claims. Thus, New Jersey law provides a sufficient and independent basis for Commission staff to concur with Johnson & Johnson's no-action request.[1]

A. State Law May Make a Shareholder Proposal Excludable from Proxy Materials

Analysis of whether a proposal is excludable from proxy materials requires an assessment of applicable state law. In particular, Rule 14a-8(i)(2) makes a proposal excludable "[i]f the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject." 17 C.F.R. § 240.14a-8(i)(2). Rule 14a-8(i)(2) reflects the Commission's determination that it would not be "appropriate to allow the inclusion in proxy materials of any proposal which, if implemented, would violate an applicable law." *Adoption of Amendments Relating to Proposals by Security Holders*, 41 Fed. Reg. 52,994, 52,996 (Dec. 3, 1976).

Accordingly, Commission staff must consider applicable state law before advising a company whether a proposal is excludable under Rule 14a-8(i)(2). And, where state law provides an independent and adequate ground for excluding a proposal, it becomes unnecessary for the agency even to consider whether the proposal would be excludable as conflicting with federal law. *See, e.g.*, Johnson & Johnson, SEC No-Action Letter (Feb. 16, 2012), https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2012/kennethsteiner021612-14a8.pdf (finding it unnecessary to address an alternative basis for omission after concurring that a proposal was excludable because it would cause the company to violate state law).

B. The Proposal Is Excludable Under Rule 14a-8(i)(2) Because It Would Cause Johnson & Johnson to Violate New Jersey State Law

The Proposal, if adopted, would cause Johnson & Johnson to violate the NJBCA and should be excluded from the company's 2019 proxy materials on that basis. *See id.* (concurring that Johnson & Johnson may omit a proposal from its proxy materials under Rule 14a-8(i)(2) because the proposal would cause the company to violate the NJBCA).

1. The New Jersey Business Corporation Act (Pre-2018 Amendment)

The NJBCA grants each business corporation the power "to make and alter by-laws for the administration and regulation of the affairs of the corporation," subject to any limitations imposed by the NJBCA or any other New Jersey statute or by the corporation's certificate of incorporation. N.J.S.A. § 14A:3-1. Section 14A:2-9 of the NJBCA addresses the making and altering of bylaws, and provides generally that "by-laws made by the board may be altered or repealed, and new by-laws made, by the shareholders." *Id.* § 14A:2-9(1). However, "[a] by-law or an amendment to a by-law which is repugnant to any part of our Corporation Act is illegal and void." *Penn-Tex. Corp. v. Niles-Bement-Pond Co.*, 34 N.J. Super. 373, 378 (Ch. Div. 1955).

[1] The State of New Jersey and its Attorney General have a substantial interest in New Jersey business corporations' compliance with the NJBCA, and the Attorney General in particular plays an important role in the administration of the NJBCA. *See, e.g.*, N.J.S.A. § 14A:12-6.

Under longstanding New Jersey case law, the right to amend bylaws is "a limited rather than an absolute right." *Lambert v. Fisherman's Dock Co-op., Inc.*, 61 N.J. 597, 600 (1972). Among other limitations, "in general the exercise of such a right should be confined to matters touching the administrative policies and affairs of the corporation, the relations of members and officers with the corporation and among themselves, and like matters of internal concern." *Id.* (citing 8 Fletcher, Cyclopedia Corporations (Perm. Ed.) § 4177; 1 Hornstein, Corporation Law & Practice (1959) § 269).

Here, as discussed in greater detail below, the Proposal's provisions on mandatory arbitration of federal securities law claims are not ones which New Jersey law permits to be set forth in the bylaws of a business corporation. These provisions would not address the internal concerns of Johnson & Johnson, but rather would seek to regulate external relationships of the company that are governed by federal law. Accordingly, the proposed bylaw amendment would violate New Jersey corporate law.

2. Delaware Case Law

The conclusion that New Jersey law does not authorize a business corporation's bylaws to provide for mandatory arbitration of federal securities law claims finds support in case law from Delaware, to which New Jersey courts frequently look for guidance on matters of corporate law in the absence of controlling New Jersey authority. *See, e.g.*, *Pogostin v. Leighton*, 216 N.J. Super. 363, 373 (App. Div. 1987).

Just as New Jersey corporate law generally confines bylaw amendments to "matters of internal concern," Delaware corporate law generally limits bylaw amendments to provisions addressing the corporation's "internal affairs." *See, e.g.*, *Sciabacucchi v. Salzberg*, C.A. No. 2017-0931-JTL, 2018 Del. Ch. LEXIS 578 (Del. Ch. Dec. 18, 2018); *Boilermakers Local 154 Ret. Fund v. Chevron Corp.*, 73 A.3d 934, 952 (Del. Ch. 2013). This limitation is reflected in § 109(b) of the Delaware General Corporation Law ("DGCL"), which provides in pertinent part: "The bylaws may contain any provision, not inconsistent with law or with the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or powers or the rights or powers of its stockholders, directors, officers or employees." 8 Del. C. § 109(b). Section 102(b)(1) of the DGCL contains a substantially similar provision applicable to certificates of incorporation.

The Delaware Court of Chancery recently addressed, in the *Sciabacucchi* case, the validity of corporate charter and bylaw provisions—like the Proposal's mandatory arbitration bylaw—that would dictate the forum for litigation of claims arising under the federal securities laws. *See Sciabacucchi*, at *2. At issue in *Sciabacucchi* were provisions in three companies' certificates of incorporation, each of which required any claims under the Securities Act of 1933 to be filed in federal court. *Id.* Applying principles common to Sections 102(b)(1) and 109(b) of the DGCL – which, again, respectively govern certificates of incorporation and bylaws – the Court held the federal forum-selection provisions to be "ineffective and invalid." *Id.* at *8.

The basis for the holding in *Sciabacucchi* was the court's conclusion that "[t]he constitutive documents of a Delaware corporation cannot bind a plaintiff to a particular forum when the claim does not involve rights or relationships that were established by or under Delaware's corporate law." *Id.* Corporate charter and bylaw provisions may not bind a plaintiff to a particular forum with respect to a federal securities law claim, the court determined, because such a claim "does not arise out of the corporate contract and does not implicate the internal affairs of the corporation." *Id.* at *7. Indeed, with respect to purchases of a corporation's shares, "[a]t the time the predicate act occurs, the purchaser is not yet a stockholder and lacks any relationship with the corporation that is grounded in corporate law." *Id.* at *8. "Because the claim exists outside of the corporate contract," the court concluded that "it is beyond the power of state corporate law to regulate." *Id.* at *6. Put differently, "the corporate contract can only regulate claims involving the corporate contract. It cannot regulate external activities, nor the

behavior of parties in other capacities." *Id.* at *46. "In light of these principles," the court concluded "there is no reason to believe that corporate governance documents, regulated by the law of the state of incorporation, can dictate mechanisms for bringing claims that do not concern corporate internal affairs, such as claims alleging fraud in connection with a securities sale." *Id.* (quoting Ann M. Lipton, *Manufactured Consent: The Problem of Arbitration Clauses in Corporate Charters and Bylaws*, 104 Geo. L.J. 583, 598 (2016)). Under *Sciabacucchi*, therefore, federal securities fraud claims are distinguishable from the kinds of state corporate law claims that may properly be addressed in forum-selection bylaw provisions.

The Court of Chancery's earlier decision in *Boilermakers* further illustrates the distinction between "internal affairs" claims, which may properly be addressed in forum-selection bylaw provisions, from "external" claims, which may not. The court in *Boilermakers* upheld a corporate bylaw provision which identified the Delaware Court of Chancery as the sole and exclusive forum for: (i) any derivative action or proceeding brought on behalf of the corporation; (ii) any action asserting a claim of breach of a fiduciary duty; (iii) any action asserting a claim arising pursuant to any provision of the DGCL; or (iv) any action asserting a claim governed by the internal affairs doctrine. *Id.* at 939. In reaching that result, the court distinguished this provision from bylaw provisions purporting to regulate "external matters," such as a forum-selection provision for tort or contract claims against the company, which would be beyond the permissible subject matter for bylaws under Section 109. *Id.* at 952. Indeed, the court emphasized that the bylaws at issue in *Boilermakers* did not purport "in any way to foreclose a plaintiff from exercising any statutory right of action created by the federal government." *Id.* at 962.[2]

Thus, Delaware law does not authorize bylaw amendments that dictate the forum for litigation arising under the federal securities laws.

3. 2018 Amendments to the NJBCA

Recent legislation amending the NJBCA should eliminate any doubt that New Jersey law, like Delaware law, does not permit forum-selection bylaw amendments relating to federal securities law claims. This legislation, which took effect on January 16, 2018, added two new subsections to N.J.S.A. § 14A:2-9, the section of the NJBCA on making and altering bylaws. *See* P.L.2017, c.356 (attached hereto as Exhibit A). Both new subsections support the conclusion that the Proposal should be excluded from Johnson & Johnson's proxy materials under Rule 14a-8(i)(2) because the proposed bylaw would be invalid under New Jersey law.

First, new subsection (4) incorporates – nearly verbatim – the first sentence of Section 109(b) of the DGCL. *See* N.J.S.A. § 14A:2-9(4) ("The by-laws may contain any provision, not inconsistent with law or the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or power or the rights or power of its shareholders, directors, officers or employees."). Thus, the New Jersey State Legislature borrowed, and adopted for the State of New Jersey, the very same statutory language that the Delaware Court of Chancery has interpreted to prohibit forum-selection provisions addressing federal securities law claims. *See* Exhibit A at 2 ("This language is based upon a provision of Delaware law.").

[2] Delaware later codified the holding of *Boilermakers*, providing that certificates of incorporation and bylaws may require "that any or all *internal corporate claims* shall be brought solely and exclusively in any or all of the courts in this State, and no provision of the certificate of incorporation or the bylaws may prohibit bringing such claims in the courts of this State." 8 Del. C. § 115 (emphasis added); *see Sciabacucchi*, at *30.

Second, new subsection (5) identifies categories of forum-selection provisions that may permissibly be included in a New Jersey business corporation's bylaws. That new subsection states in relevant part:

> Without limiting [N.J.S.A. § 14A:2-9(4)], the by-laws may provide that the federal and State courts in New Jersey shall be the sole and exclusive forum for:
>
> > (i) any derivative action or proceeding brought on behalf of the corporation;
> >
> > (ii) any action by one or more shareholders asserting a claim of a breach of fiduciary duty owed by a director or officer, or former director or officer, to the corporation or its shareholders, or a breach of the certificate of incorporation or by-laws;
> >
> > (iii) any action brought by one or more shareholders asserting a claim against the corporation or its directors or officers, or former directors or officers, arising under the certificate of incorporation or the "New Jersey Business Corporation Act," N.J.S.A. 14A:1-1 et seq.;
> >
> > (iv) any other State law claim, including a class action asserting a breach of a duty to disclose, or a similar claim, brought by one or more shareholders against the corporation, its directors or officers, or its former directors or officers; or
> >
> > (v) any other claim brought by one or more shareholders which is governed by the internal affairs or an analogous doctrine.

Id. § 14A:2-9(5)(a). All of the actions and claims that may be subject to forum-selection bylaw provisions under new § 14A:2-9(5)(a) may be characterized as types of "internal affairs" claims—reinforcing § 14A:2-9(4)'s limitations on the subject matter appropriate for bylaws. *See* Exhibit A at 2 ("The bill specifically allows the by-laws of a New Jersey corporation to contain exclusive forum clauses to provide that the federal and State courts in New Jersey are the sole and exclusive forum for disputes related to the 'internal affairs' of the corproation").

In contrast, forum-selection provisions relating to actions or claims arising under the federal securities laws are notably absent from the list of permissible forum-selection provisions. This omission is significant for purposes of statutory construction because New Jersey courts traditionally recognize the "canon of statutory construction, *expression unius est exclusion alterius*—expression of one thing suggests the exclusion of another left unmentioned." *Brodsky v. Grinnell Haulers, Inc.*, 181 N.J. 102, 112 (2004); *see, e.g.*, *Feuer v. Merck & Co.*, 455 N.J. Super. 69, 85 (App. Div. 2018). Had the Legislature intended to authorize bylaws that would dictate the forum for federal securities law actions and claims, it would have said so when it amended the NJBCA just a year ago.

Thus, if there were any doubt as to whether New Jersey law permits a business corporation's bylaws to include a forum-selection provision governing federal securities law actions or claims, the 2018 amendments to the NJBCA provide a clear answer: "No."

* * *

Because the Proposal, if adopted, would cause Johnson & Johnson to violate New Jersey state law, in the opinion of my Office, the Proposal should be excluded under Rule 14a-8(i)(2). Accordingly, I respectfully request that the Commission take no action against Johnson & Johnson if the company excludes the Proposal from its forthcoming proxy materials.

Sincerely,

GURBIR S. GREWAL
ATTORNEY GENERAL

cc: The Honorable Jay Clayton
Chair, U.S. Securities and Exchange Commission

Thomas J. Spellman III
Assistant General Counsel and Corporate Secretary
Johnson & Johnson

Marc S. Gerber, Esq.
Skadden Arps Slate Meagher & Flom

Hal Scott
Trustee
The Doris Behr 2012 Irrevocable Trust

Exhibit A

CHAPTER 356

AN ACT concerning corporate by-laws and amending N.J.S.14A:2-9.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. N.J.S.14A:2-9 is amended to read as follows:

By-laws; making and altering.

14A:2-9 (1) The initial by-laws of a corporation shall be adopted by the board at its organization meeting. Thereafter, the board shall have the power to make, alter and repeal by-laws unless such power is reserved to the shareholders in the certificate of incorporation, but by-laws made by the board may be altered or repealed, and new by-laws made, by the shareholders. The shareholders may prescribe in the by-laws that any by-law made by them shall not be altered or repealed by the board.

(2) The initial by-laws of a corporation adopted by the board at its organization meeting shall be deemed to have been adopted by the shareholders for purposes of this act.

(3) Any provision which this act requires or permits to be set forth in the by-laws may be set forth in the certificate of incorporation with equal force and effect.

(4) The by-laws may contain any provision, not inconsistent with law or the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or power or the rights or power of its shareholders, directors, officers or employees.

(5) (a) Without limiting subsection (4) of this section, the by-laws may provide that the federal and State courts in New Jersey shall be the sole and exclusive forum for:

(i) any derivative action or proceeding brought on behalf of the corporation;

(ii) any action by one or more shareholders asserting a claim of a breach of fiduciary duty owed by a director or officer, or former director or officer, to the corporation or its shareholders, or a breach of the certificate of incorporation or by-laws;

(iii) any action brought by one or more shareholders asserting a claim against the corporation or its directors or officers, or former directors or officers, arising under the certificate of incorporation or the "New Jersey Business Corporation Act," N.J.S.14A:1-1 et seq.;

(iv) any other State law claim, including a class action asserting a breach of a duty to disclose, or a similar claim, brought by one or more shareholders against the corporation, its directors or officers, or its former directors or officers; or

(v) any other claim brought by one or more shareholders which is governed by the internal affairs or an analogous doctrine.

(b) The by-laws may provide that one or more shareholders who file an action in breach of a forum selection requirement of the by-laws shall be liable for all reasonable costs incurred in enforcing the requirement, including, without limitation, reasonable attorney's fees of the defendants. If the by-laws contain an exclusive forum provision, the directors and officers, and former directors and officers, shall be deemed to have consented to the personal jurisdiction of that forum. If the provision is not contained in the original by-laws but is adopted by an amendment, the provisions and the personal jurisdiction over directors and officers, and former directors and officers, shall apply only to actions brought by one or more shareholders after the date of the amendment of the by-laws and which assert claims arising after the date of the amendment.

2. This act shall take effect immediately.

Approved January 16, 2018.

ASSEMBLY COMMERCE AND ECONOMIC DEVELOPMENT COMMITTEE

STATEMENT TO

ASSEMBLY, No. 2162

STATE OF NEW JERSEY

DATED: NOVEMBER 30, 2017

The Assembly Commerce and Economic Development Committee reports favorably Assembly Bill No. 2162.

This bill concerns the scope of issues that may be addressed in the by-laws of a New Jersey corporation and provides that corporate by-laws may include a forum selection requirement.

The bill provides that the by-laws of a New Jersey corporation may contain any provision that is not inconsistent with law or the certificate of incorporation and is related to the business of the corporation, the conduct of its affairs, and its rights or power or the rights or power of its shareholders, directors, officers, or employees. This language is based upon a provision of Delaware law.

The bill specifically allows the by-laws of a New Jersey corporation to contain exclusive forum clauses to provide that the federal and State courts in New Jersey are the sole and exclusive forum for disputes related to the "internal affairs" of the corporation. This applies to the following types of actions:

- a derivative action or proceeding brought on behalf of the corporation;
- an action by one or more shareholders asserting a claim of a breach of fiduciary duty;
- an action brought by one or more shareholders asserting a claim against the corporation or its directors or officers, or former directors or officers, arising under the "New Jersey Business Corporation Act," or the certificate of incorporation; or
- any other State law claim or other claim brought by one or more shareholders which is governed by the internal affairs or an analogous doctrine.

The bill clarifies that the by-laws of a New Jersey corporation may provide that any shareholder who files an action in breach of a corporation's forum selection requirement would be liable for all reasonable costs incurred in enforcing the requirement. The bill also provides that if the by-laws contain an exclusive forum provision, certain directors and officers will be deemed to consent to the jurisdiction of the forum that is selected in the provision.

This bill was pre-filed for introduction in the 2016-2017 session pending technical review. As reported, the bill includes the changes required by technical review, which has been performed.

ASSEMBLY, No. 2162

STATE OF NEW JERSEY

217th LEGISLATURE

PRE-FILED FOR INTRODUCTION IN THE 2016 SESSION

Sponsored by:
Assemblyman PATRICK J. DIEGNAN, JR.
District 18 (Middlesex)
Assemblyman GARY S. SCHAER
District 36 (Bergen and Passaic)
Assemblyman RAJ MUKHERJI
District 33 (Hudson)

SYNOPSIS

Clarifies scope of corporate by-laws; provides that by-laws may include forum selection clause.

CURRENT VERSION OF TEXT

As reported by the Assembly Commerce and Economic Development Committee with technical review.

(Sponsorship Updated As Of: 1/6/2018)

AN ACT concerning corporate by-laws and amending N.J.S.14A:2-9.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. N.J.S.14A:2-9 is amended to read as follows:

14A:2-9 (1) The initial by-laws of a corporation shall be adopted by the board at its organization meeting. Thereafter, the board shall have the power to make, alter and repeal by-laws unless such power is reserved to the shareholders in the certificate of incorporation, but by-laws made by the board may be altered or repealed, and new by-laws made, by the shareholders. The shareholders may prescribe in the by-laws that any by-law made by them shall not be altered or repealed by the board.

(2) The initial by-laws of a corporation adopted by the board at its organization meeting shall be deemed to have been adopted by the shareholders for purposes of this act.

(3) Any provision which this act requires or permits to be set forth in the by-laws may be set forth in the certificate of incorporation with equal force and effect.

(4) The by-laws may contain any provision, not inconsistent with law or the certificate of incorporation, relating to the business of the corporation, the conduct of its affairs, and its rights or power or the rights or power of its shareholders, directors, officers or employees.

(5) (a) Without limiting subsection (4) of this section, the by-laws may provide that the federal and State courts in New Jersey shall be the sole and exclusive forum for:

(i) any derivative action or proceeding brought on behalf of the corporation;

(ii) any action by one or more shareholders asserting a claim of a breach of fiduciary duty owed by a director or officer, or former director or officer, to the corporation or its shareholders, or a breach of the certificate of incorporation or by-laws;

(iii) any action brought by one or more shareholders asserting a claim against the corporation or its directors or officers, or former directors or officers, arising under the certificate of incorporation or the "New Jersey Business Corporation Act," N.J.S.14A:1-1 et seq.;

(iv) any other State law claim, including a class action asserting a breach of a duty to disclose, or a similar claim, brought by one or more shareholders against the corporation, its directors or officers, or its former directors or officers; or

(v) any other claim brought by one or more shareholders which is governed by the internal affairs or an analogous doctrine.

EXPLANATION – Matter enclosed in bold-faced brackets [thus] in the above bill is not enacted and is intended to be omitted in the law.

Matter underlined thus is new matter.

(b) The by-laws may provide that one or more shareholders who file an action in breach of a forum selection requirement of the by-laws shall be liable for all reasonable costs incurred in enforcing the requirement, including, without limitation, reasonable attorney's fees of the defendants. If the by-laws contain an exclusive forum provision, the directors and officers, and former directors and officers, shall be deemed to have consented to the personal jurisdiction of that forum. If the provision is not contained in the original by-laws but is adopted by an amendment, the provisions and the personal jurisdiction over directors and officers, and former directors and officers, shall apply only to actions brought by one or mores shareholders after the date of the amendment of the by-laws and which assert claims arising after the date of the amendment.

(cf: N.J.S.14A:2-9)

2. This act shall take effect immediately.