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The Honorable Jay Clayton
Chairman
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

December 21, 2018

Dear Chairman Clayton,

We write on behalf of Public Citizen, a non-profit membership organization with more than 500,000 members and supporters nationwide to urge the Division of Corporate Finance to issue Johnson & Johnson a "no action" letter stating that the Securities and Exchange Commission (SEC or Commission) will take no enforcement action if the company excludes from its proxy materials a shareholder proposal by The Doris Behr 2012 Irrevocable Trust that would allow the company to force everyday investors into secretive, binding arbitration. Failing to issue a no action letter in a timely manner would constitute a significant change in longstanding SEC policy without the deliberative process that you publicly pledged to undertake.

I. A Reversal of Longstanding SEC Policy is Contrary to Case Law and Public Policy

We have previously stated in letters to you our clear position that the SEC's powers to enforce prohibitions on manipulative practices and to enforce the anti-waiver provisions in federal securities law confer ample authority on the SEC to ban these insidious provisions.[1] The Securities Act of 1933 and the Securities Exchange Act of 1934 include anti-waiver provisions that nullify a contract that seeks to waive compliance with those laws.[2] Congress mandated the SEC to protect investors against "manipulative and deceptive" practices.[3] In addition, the Supreme Court has

[1] See Letters from Public Citizen to Jay Clayton, Chair, U.S. Securities and Exchange Commission, *available at* https://www.citizen.org/system/files/case_documents/letter_to_sec_on_piwowar_comments.pdf *and* https://www.citizen.org/sites/default/files/pc_bm_letter_sec_arb_3-16-18.pdf.
[2] *See* 15 U.S.C. §§ 77n, 78cc ("Waiver Provisions").
[3] 15 U.S.C. § 78j.

recognized that the Commission has authority under the statutes to regulate the use of arbitration to ensure that it does not prevent the vindication of investors' rights.[4] Forcing investors into a system that would prevent the class remedies that are essential to effective enforcement of investors' rights is, in our view, clearly manipulative.

Moreover, the SEC should protect investors by maintaining its position against forced arbitration clauses and bans on class actions ("forced arbitration clauses") in corporate charters or bylaws because it is difficult for investors to vindicate their rights under federal securities law absent the ability to bring a class action. This axiomatic principle has been articulated many times, but bears repeating. Individual investors oftentimes do not have the ability to bring complex securities claims on their own. Thus, "[c]lass actions are a particularly appropriate and desirable means to resolve claims based on the securities laws, 'since the effectiveness of the securities laws may depend in large measure on the application of the class action device.'"[5] Even where the SEC has allowed the use of arbitration under the securities laws, most notably in the FINRA rules authorizing the use of customer arbitration agreements by broker-dealers, it has acted to ensure that the availability of class actions in court is not impaired,[6] and has used its authority to shine greater transparency on the arbitration process in the expungement context.[7]

Finally, private lawsuits play an indispensable role in policing misconduct, deterring bad actors, and returning ill-gotten corporate gains to investors. Former SEC Chairmen William Donaldson and Arthur Levitt, Jr., and former Commissioner Harvey Goldschmid, who were nominated to serve by presidents of both political parties, clearly stated in an *amicus curiae* brief the importance of private enforcement. They said:

> "Investors must rely primarily on private actions to recover when defrauded. The SEC's disgorgement and civil money penalty powers, although enhanced by the Sarbanes-Oxley Act, are limited, and will generally cover only a fraction of the damage done to investors by serious securities fraud. Moreover, the SEC with limited resources cannot possibly undertake to bring actions in every one or even most of the financial fraud cases that have proliferated over the past few years. …Private cases, so long as they are well grounded, are an important enforcement mechanism supplementing the SEC in the policing of our markets."[8]

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[4] Shearson/American Express, Inc. v. McMahon, 482 U.S. 220, 238 (1987).
[5] Eisenberg v. Gagnon (*quoting* Kahan v. Rosenstiel, 424 F.2d 161, 169 (3d Cir.), *cert. denied,* 398 U.S. 950, 90 S.Ct. 1870, 26 L.Ed.2d 290 (1970)).
[6] *See* Charles Schwab & Co. v. FINRA, 861 F. Supp. 2d 1063, 1068–69 (N.D. Cal. 2012).
[7] *See* FINRA Regulatory Notice on Expungement of Customer Dispute Information (Dec. 6, 2017), *available at*http://www.finra.org/sites/default/files/notice_doc_file_ref/Regulatory-Notice-17-42.pdf; *see also* Letter from Susan Harley and Remington A. Gregg to Marcia E. Asquith, FINRA (Feb. 5, 2018) (on file with authors).
[8] Brief for Former SEC Commissioners et al. as Amici Curiae Supporting Respondents, Stoneridge Inv. Partners v. Scientific-Atlanta, Inc., 128 S. Ct. 761, 7-8 (2007).

II. The SEC Can Take No Other Course But to Issue a No Action Letter

The SEC's policy prohibiting the use of arbitration clauses in investor documents is longstanding and settled policy, and the dangers to investors if this position is reversed been clearly articulated.[9] We respectfully refer to your own comments in response to a letter from members of the House of Representative's House Financial Services Committee that urged you to uphold the Commission's longstanding position on banning forced arbitration clauses. You noted that this issue is not a priority of your tenure and that any consideration to reverse longstanding policy would be referred to the full Commission and require "careful consideration." Given your statement, Johnson & Johnson's own request to the Commission to issue a no action letter, and Johnson & Johnson's upcoming April 2019 shareholder meeting,[10] it seems impossible for the Commission to take any other action in such a short timeframe but to issue a no action letter.

To take any other course of action would be a violation of your own commitment to carry out a deliberative process. Current Commissioner Robert J. Jackson, Jr., noted that the Commission must consider important unanswered legal questions before making any changes:

> "What would the effect of SEC action in this area be for state law? What would the Delaware courts say about the relationship between forced arbitration and a board's fiduciary duties? Would our approval of such provisions even be consistent with the federal securities laws? And what would be the practical effect for SEC enforcement priorities—especially at a time when our regulators are increasingly being asked to do more with less? If investors are soon barred from bringing suits in court, then the burden of investigating and litigating these cases may fall entirely on the SEC. How much would Congress need to appropriate to make sure we have enough resources to do the job?"[11]

A unilateral change in longstanding SEC policy on forced arbitration without considered discussion would warrant congressional oversight and action. Thus, we join the hundreds of organizations and the group of bipartisan State Treasurers that have urged you to uphold the SEC's longstanding policy on forced arbitration. The State Treasurers noted that a change to allow for a privatized system of justice "eliminate[s] the ability of all but the largest shareholders

[9] Consumer Federation of America, *A Settled Matter: Mandatory Shareholder Arbitration is Against the Law and Public Interest*, *available at* https://secureoursavings.com/wp-content/uploads/2018/08/CFA-Mandatory-Shareholder-Arbitration-White-Paper-8.15.18.pdf.

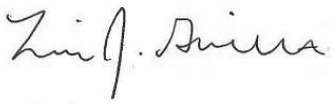
[10] While Johnson & Johnson has not publicly announced the date for its 2019 shareholder meeting, the last three were held in April.

[11] Robert J. Jackson, Jr., SEC Commissioner, Keeping Shareholders on the Beat: A Call for a Considered Conversation About Mandatory Arbitration (Feb. 26, 2018), *available at* https://www.sec.gov/news/speech/jackson-shareholders-conversation-about-mandatory-arbitration-022618 (citations omitted).

to seek recompense from criminals and may force massive expansion of government enforcement and oversight programs."[12]

Giving investors access to the courts is vital to allowing them to vindicate their rights when they are wronged. It ensures that they can hold corporate wrongdoers accountable, prevents corporate wrongdoers from keeping ill-gotten gains, and deters wrongdoing by assisting in policing the market—which benefits our entire society. If you have any questions, please contact Remington A. Gregg at remington.gregg@citizen.org.

Sincerely,



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[12] Letter from Eleven State Treasurers to Jay Clayton, Chairman, U.S. Securities and Exchange Commission (Nov. 13, 2018), *available at https://secureoursavings.com/wp-content/uploads/2018/11/SFOF-Letter-to-SEC-Chairman-Clayton-1.pdf.*