UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

DIVISION OF
CORPORATION FINANCE

March 6, 2020

Christine L. Connolly
Dollar General Corporation
sjulia@dollargeneral.com

Re: Dollar General Corporation
Incoming letter dated January 9, 2020

Dear Ms. Connolly:

This letter is in response to your correspondence dated January 9, 2020 and February 20, 2020 concerning the shareholder proposal (the "Proposal") submitted to Dollar General Corporation (the "Company") by the New York City Employees' Retirement System et al. (the "Proponents") for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders. We also have received correspondence on the Proponents' behalf dated February 7, 2020. Copies of all of the correspondence on which this response is based will be made available on our website at http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8.shtml.

Sincerely,

M. Hughes Bates
Special Counsel

Enclosure

cc: Kathryn E. Diaz
Office of the Comptroller of the City of New York
kdiaz@comptroller.nyc.gov

March 6, 2020

Response of the Office of Chief Counsel
<u>Division of Corporation Finance</u>

Re: Dollar General Corporation
Incoming letter dated January 9, 2020

The Proposal urges the board to report to shareholders on "the use of contractual provisions requiring employees of [the Company] to arbitrate employment-related claims." The resolved clause further states that the report should specify the proportion of the workforce subject to such provisions; the number of employment-related arbitration claims initiated and decided in favor of the employee in the previous calendar year; and any changes in policy or practice the Company has made, or intends to make, as a result of California's ban on agreeing to arbitration as a condition of employment.

There appears to be some basis for your view that the Company may exclude the Proposal under rule 14a-8(i)(7) as the Proposal does not transcend the Company's ordinary business operations. In our view, notwithstanding some references in the supporting statement to potentially important social issues, the Proposal as a whole deals with a matter relating to the Company's ordinary business operations – the overall "use" of arbitration – and does not focus on any particular policy implication of that use at this particular company. <u>See</u> Staff Legal Bulletin No. 14K (discouraging "proponents and companies [from focusing] on the overall significance of the policy issue raised by the proposal, instead of whether the proposal raises a policy issue that transcends the particular company's ordinary business operations"). Accordingly, we will not recommend enforcement action to the Commission if the Company omits the Proposal from its proxy materials in reliance on rule 14a-8(i)(7).

Sincerely,

Lisa Krestynick
Special Counsel

DOLLAR GENERAL

100 Mission Ridge
Goodlettsville, TN 37072
U.S.A.

February 20, 2020

Via E-Mail (shareholderproposals@sec.gov)

U.S. Securities and Exchange Commission
Division of Corporation Finance
Office of Chief Counsel
100 F Street, N.E.
Washington, DC 20549

Re: Dollar General Corporation
Exclusion of Shareholder Proposal from the Office of the Comptroller of the City of New York

Ladies & Gentlemen:

I am writing on behalf of Dollar General Corporation (the "Company") with respect to the shareholder proposal and supporting statement (collectively, the "Proposal") submitted by the Office of the Comptroller of the City of New York (the "Proponent"), in its capacity as custodian and trustee of The New York City Employees' Retirement System, The New York City Teachers' Retirement System and The New York City Police Pension Fund, and custodian of The New York City Board of Education Retirement System.

On January 9, 2020, the Company submitted a letter (the "No Action Request") to the Staff (the "Staff") of the Division of Corporation Finance of the Securities and Exchange Commission (the "Commission") requesting that the Staff not recommend any enforcement action against the Company if it excludes the Proposal from its proxy statement and form of proxy (collectively, the "Proxy Materials") for its 2020 Annual Meeting of Shareholders. The Company's No Action Request provided the Company's analysis in support of the Proposal's exclusion from the Proxy Materials in reliance on Rule 14a-8(i)(7) under the Securities Exchange Act of 1934, as amended (the "Exchange Act"), which permits a company to exclude from its proxy materials a shareholder proposal that "deals with a matter relating to the company's ordinary business operations."

On February 4, 2020, the Proponent submitted a letter to the Staff responding to the No Action Request (the "Response Letter"). The Response Letter and accompanying correspondence from the Proponent are attached hereto as **Exhibit A**.

In response thereto, the Company would like to reply to certain assertions made in the Response Letter. While the Company does not intend to repeat the legal analysis and arguments set forth in the No Action Request, the Company does want to expand upon certain points that support exclusion of the Proposal from the Proxy Materials pursuant to Rule 14a-8(i)(7) of the Exchange Act.

Pursuant to Rule 14a-8(j) under the Exchange Act, we are simultaneously providing the Proponent with a copy of this submission. The Company will promptly forward to the Proponent any response received from the Staff to this submission that the Staff transmits by e-mail or fax only to the Company.

1. *The Proposal Does Not Raise a Discrete Significant Policy Issue related to the Company's Ordinary Business Operations.*

In the Response Letter, the Proponent acknowledges that the Company's use of arbitration agreements relates to ordinary business matters and, for that reason, attempts to show that the Proposal focuses on a significant policy issue that transcends ordinary business operations for the Company. To this end, the Proponent devotes significant discussion to certain policy issues that sometimes arise in connection with employee-related claims such as sexual harassment. The Company believes that the Proponent is conflating its selected policy issues with the tool (i.e., agreements to arbitrate) used by companies to manage large, complex workforces.

The Proponent summarizes the primary issue before the Staff on page 5 of the Response Letter:

> ...what remains unclear from *CBRE Group, Inc.* is whether the Staff found the proposal to transcend ordinary business because its focus was limited to the use of mandatory arbitration (as opposed to the more varied assortment of employment-related policies at issue in *Amazon.com, Inc.* and *Yum! Brands, Inc.*), or because the focus on mandatory arbitration was itself further linked to the risks created by the mandatory arbitration of sexual harassment claims.

The Proponent's position is that the Company's use of arbitration agreements to resolve employee-related claims in *any context* is by itself a significant policy issue that brings the matter within the purview of shareholders. By contrast, the Company believes that there must be a specific linkage between the use of arbitration agreements and a significant policy issue related to the Company, as was the case with sexual harassment for CBRE under *CBRE Group, Inc.*, for the proposal to transcend the Company's ordinary business operations.

The Staff recently articulated the applicable significance analysis in Staff Legal Bulletin No. 14K ("SLB 14K"):

> In the past, proponents and companies have often focused on the overall significance of the policy issue raised by the proposal, instead of whether the proposal raises a policy issue that transcends the particular company's ordinary business operations. The staff takes a *company-specific approach in evaluating significance*, rather than recognizing particular issues or categories of issues as universally "significant." Accordingly, a policy issue that is significant to one company may not be significant to another.[1]

1 Securities and Exchange Commission, Staff Legal Bulletin No. 14K, § 2 (Oct. 16, 2019) (emphasis added).

The Proponent is attempting to overcome this hurdle by associating numerous policy issues with the Proposal and arguing that, collectively, they serve to make the use of agreements to arbitrate employment-related claims a significant policy issue by itself. The Proponent makes no attempt to relate the underlying issues it cites of sexual harassment, wage and hour matters, and discrimination to the Company. Instead, the Proponent attempts to tie the use of arbitration agreements, as a policy issue by itself, to the Company by (1) stating the fact that the Company has a large workforce and utilizes arbitration agreements, (2) assuming that it is "quite likely" that a large number of Company employees have agreed to arbitration, and (3) taking an enormous leap of logic to conclude (without citing any evidence) that the Company's provision of a 30-day period during which new employees can consider, seek advice on, and ultimately opt out (or not) with respect to the Company's arbitration agreement, "means that many—if not most—of Dollar General's employees are subject to an arbitration agreement that, at best, they have limited knowledge of."[2] The Proponent's assumptions and unfounded conclusions could just as easily be applied to hundreds of companies with large workforces that utilize agreements to arbitrate employment-related claims.

The effect of accepting the Proponent's argument that the use of arbitration agreements for employment related claims is a significant policy issue by itself would disconnect it from the various policy issues that have garnered media and political attention for the practice in the first place. Coupled with the Proponent's conjecture-filled case for relating the practice to a specific business such as the Company's, the Proponent's arguments would obviate the Staff's guidance in SLB 14K and result the use of arbitration agreements becoming a policy issue universally significant to virtually all public companies.

2. *The Media and Political Attention Cited by the Proponent Do Not Demonstrate that the Proposal Relates to a Significant Policy Issue that Transcends Ordinary Business with Respect to the Company.*

The Response Letter refers to numerous media articles critical of arbitration agreements as well as legislative actions and proposals to limit or bar arbitration of employee-related claims, all intended to support the Proponent's contention that such attention shows that the use of contractual provisions requiring employees to arbitrate their employment-related claims has, in all contexts, become an issue that transcends ordinary business operations for any company that uses arbitration agreements as one means by which to cost-effectively manage a large workforce.

However, by noting the recent actions by companies such as Google, Uber and Microsoft to reduce mandatory arbitration of discrimination claims, the Proponent supports the Company's argument. Each of those companies took action not because the use of arbitration agreements for employment-related claims was itself a significant policy issue, but because, as noted by the Proponent, each was concerned about an actual policy issue relevant to the particular company – sexual misconduct in the case of Google and Uber and gender discrimination and harassment for Microsoft.[3]

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2 Response Letter at 14.

3 *See* Response Letter at 5.

Indeed, the Response Letter notes that these companies only "eliminat[ed] or reduc[ed] mandatory arbitration of discrimination claims."[4] The other sources cited by the Proponent, while ostensibly related to the use of arbitration agreements, really focus on similar underlying policy issues such as sexual harassment.

The Proponent also relies on a discussion of recent state legislative initiatives with respect to agreements to arbitrate employment-related claims, including the law recently passed by the California legislature ("AB 51"). The Proposal, in part, also seeks information regarding changes in policy or practice that the Company has made or intends to make as a result of AB 51. Importantly, the federal court for the Eastern District of California has entered a preliminary injunction against enforcement of AB 51 in a case brought against California by a coalition of business groups led by the Chamber of Commerce of the United States and the Chamber of Commerce of California.[5] In its order granting the preliminary injunction, the Court emphasized that the U.S. Supreme Court has declared as a "bedrock principle" that the Federal Arbitration Act (the "FAA") "reflects a national policy favoring arbitration"[6] and further recognized that such policy, in the context of at least one expert witness, is grounded in the ordinary business concerns of American employers – i.e., costs and efficiency.[7]

Of course, the FAA does not preempt shareholder oversight of mandatory arbitration agreements. Nonetheless, the focus of the court's decision in *Becerra* demonstrates that a determination with respect to a company's use of arbitration agreements involves the intersection of many factors that are ordinary business matters, including information regarding the costs, benefits and efficiencies of using arbitration, the size and makeup of a company's workforce, the laws of various jurisdictions in which a company operates, and the impact of arbitration on various types of claims. The amount of information necessary to make such determinations in all contexts in which a company uses arbitration agreements is not practicable for provision to shareholders.

3. *The Compensation Committee is the Appropriate Governing Body to Review the Proposal*

Instead of relating any allegedly significant policy issue specifically to the Company, the Proponent attacks the process by which the Company analyzed and determined the significance of the Proposal to the Company. First, the Proponent misconstrues the Staff's recent guidance in SLB 14K by contending that the full board is the only "appropriate body with fiduciary duties to shareholders" that is fit to give due consideration to the significance of a policy issue.[8] The Company believes that if that was the Staff's intent, the passage from SLB 14K quoted by the Proponent would have referred to "the board" rather than an "appropriate body with fiduciary duties." Of course, as noted in the No Action Request, the Company's full board did review and concur with the analysis in any case.

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4 *Id.* (emphasis added).

5 See *Chamber of Commerce v. Becerra*, No. 2:19-cv-02456, Order (E.D.Ca. Feb. 7, 2020).

6 *Id.* at 23 (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 345-46 (2011)).

7 *See generally id.* at 25-32.

8 *See* Response Letter at 15.

Second, the Proponent argues, based solely on the charters of the Company's Compensation Committee and Nominating and Governance Committee, that the Compensation Committee was not the appropriate committee of the Company's board to review this matter. The Proponent quotes from the Nominating and Governance Committee Charter but omits a key portion of the provision related to shareholder proposals: "unless involving a matter delegated to or within the expertise of another Board committee."[9] In this case, the Compensation Committee was determined to be the appropriate body with fiduciary duties to shareholders to examine and analyze the extent to which the Proposal raised a significant policy issue for the Company. This determination factored in considerations such as the fact that (1) the Compensation Committee had focused in the past on company-wide employee-related social issues such as diversity, and (2) the Compensation Committee's Chairperson is also the Chief Executive Officer of the Center for Talent Innovation, a non-profit think tank that focuses on helping global corporations leverage talent across the divides of culture, gender, geography, and generation.[10] In short, the Company's significance analysis is not defective as the Proponent contends.

CONCLUSION

Based upon the foregoing and the analysis contained in the No Action Request, the Company respectfully reaffirms its request that the Staff concur that it will take no action if the Company excludes the Proposal from its Proxy Materials. The Company would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Please contact me with any questions with respect to this request, or if for any reason the Staff does not agree that the Company may exclude the Proposal from its Proxy Materials.

Correspondence from the Staff or the Proponent may be directed to me in care of Selene Julia (sjulia@dollargeneral.com; 615-855-5177).

Respectfully,

Christine L. Connolly
Corporate Secretary

Enclosures

cc: Michael Garland, Assistant Comptroller, City of New York (*via overnight mail and e-mail*)
Rhonda Taylor, Esq., Dollar General Corporation (*via e-mail*)
Gregory F. Parisi, Esq., Troutman Sanders LLP (*via e-mail*)

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9 *See* Dollar General Nominating and Governance Committee Charter, Article V, Section 9, *available at*: https://investor.dollargeneral.com/websites/dollargeneral/English/5300/corporate-governance-documents.html.

10 *See* Biography of Patricia Fili-Krushel, CEO of the Center for Talent Innovation, *available at*: https://investor.dollargeneral.com/websites/dollargeneral/English/5100/board-of-directors.html.

Exhibit A

Selene Julia

From:	Bliss, Ronald Joshua <jbliss@comptroller.nyc.gov>
Sent:	Friday, February 7, 2020 3:00 PM
To:	shareholderproposals@sec.gov
Cc:	Selene Julia; Diaz, Kathryn (Kay); Garland, Michael
Subject:	Dollar General Corporation (incoming letter dated January 9, 2020) (Response from New York City Funds)
Attachments:	Dollar General No Action Response Letter - 2.7.20.pdf

EXTERNAL MESSAGE: Exercise Caution

Dear SEC Division of Corporation Finance:

The Comptroller of the City of New York, on behalf of the New York City Employees' Retirement System, the New York City Teachers' Retirement System, the New York City Police Pension Fund, and the New York City Fire Pension Fund (collectively, the "Systems"), submits the Systems' attached response to Dollar General Corporation's letter to the Division of Corporation Finance, dated January 9, 2020, which sought no-action relief in connection with Dollar General's intent to omit the Systems' shareholder proposal from its 2020 proxy materials.

Dollar General's Selene Julia, who has been designated by Dollar General Corporate Secretary Christine L. Connolly to receive correspondence concerning this no-action request, has been copied on this email.

Please do not hesitate to contact me if you have any questions.

Regards,

Joshua Bliss
Associate General Counsel
Office of Comptroller of the City of New York
Office of the General Counsel (Suite 602)
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CITY OF NEW YORK
OFFICE OF THE COMPTROLLER
SCOTT M. STRINGER

KATHRYN E. DIAZ
GENERAL COUNSEL

OFFICE OF THE GENERAL COUNSEL

February 7, 2020

By e-mail: shareholderproposals@sec.gov

Securities and Exchange Commission
Office of the Chief Counsel
Division of Corporation Finance
100 F Street, NE
Washington, DC 20549

Re: Response to Dollar General Corporation's January 9, 2020 No-Action Request

Dear Counsel:

I write on behalf of the New York City Employees' Retirement System, the New York City Teachers' Retirement System, the New York City Police Pension Fund and the New York City Fire Pension Fund (collectively, the "Systems") in response to the letter from Dollar General Corporation ("Dollar General" or the "Company"), dated January 9, 2020, stating that Dollar General intends to omit the Systems' shareholder proposal ("Proposal") from its 2020 proxy materials and seeking the concurrence of the staff of the Division of Corporate Finance ("Staff") on this intended omission (the "No-Action Request").[1] Dollar General has not met its burden of establishing that the Proposal is excludable under Rule 14a-8(i)(7) as a matter pertaining to the Company's "ordinary business operations." The subject matter of the Proposal—the use of contractual provisions requiring employees to arbitrate employment-related claims—has recently emerged as a significant policy issue that transcends Dollar General's ordinary business operations. As such, the Proposal cannot be excluded under the ordinary business exception. The Systems respectfully request that the Staff deny Dollar General's No-Action Request.

The Proposal and Supporting Statement

The Proposal[2] states:

"RESOLVED that shareholders of Dollar General Corporation. [sic] ("Dollar General") urge the Board of Directors to report to shareholders, at reasonable cost and omitting confidential and proprietary information, on the use of contractual provisions requiring

[1] The Comptroller of the City of New York is the custodian, investment advisor, and a trustee of the Systems and the Systems' Boards of Trustees have authorized the Comptroller to file the Proposal on their behalf.
[2] Dollar General attached the Proposal and Supporting Statement as Exhibit A to the No-Action Request.

DAVID N. DINKINS MUNICIPAL BUILDING • ONE CENTRE STREET, SUITE 602 • NEW YORK, NY 10007
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employees of Dollar General to arbitrate employment-related claims. The report should specify the proportion of the workforce subject to such provisions; the number of employment-related arbitration claims initiated and decided in favor of the employee, in each case in the previous calendar year; and any changes in policy or practice Dollar General has made, or intends to make, as a result of California's ban on agreeing to arbitration as a condition of employment."

The Supporting Statement helps explain why the Proposal presents a significant policy issue for Dollar General. Contractual provisions requiring employees to arbitrate employment-related claims—which Dollar General makes widespread use of—preclude "employees from suing in court for wrongs like wage theft, discrimination and harassment, and require[] them to submit to private arbitration." Because arbitration is private and contractual in nature, and often subject to confidentiality requirements, the arbitration of "employment-related claims can allow a toxic culture to flourish, increasing the severity of eventual consequences and harming employee morale." Various high-profile sexual harassment cases at large employers such as Fox News, Google and Uber have served to focus "public attention ... on the use by companies of agreements requiring employees to pursue employment-related claims, including sexual harassment claims, through arbitration." In response to these cases, a "robust public debate has ensued, including responses by legislators, regulators and state attorneys general."

<u>The Analytical Framework</u>

The "ordinary business" exception permits a company to exclude a proposal that "deals with a matter relating to the company's ordinary business operations."[3] The applicability of this exception rests on two considerations: (1) the "proposal's subject matter," and (2) "the degree to which the proposal 'micromanages' the company."[4]

With respect to the "subject matter" consideration—which is the only basis for exclusion invoked by Dollar General—shareholder proposals are excludable if they "raise matters 'so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight.'"[5] However, "[t]he fact that a proposal relates to ordinary business matters does not conclusively establish that a company may exclude the proposal from its proxy materials."[6] Rather, proposals that relate to ordinary business matters, but which nevertheless "focus[] on a significant policy issue," are not excludable "'because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.'"[7]

In determining whether a policy issue has become sufficiently "significant," the Commission examines "the proposal and the supporting statement as a whole,"[8] and determines whether there is "widespread public debate regarding [the] issue."[9] The subject matter of a

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[3] Rule 14a-(8)(i)(7).
[4] Staff Legal Bulletin 14K (Oct. 16, 2019) ("SLB 14K") at § B.1.
[5] *Id.* at § B.2. (quoting Exchange Act Release No. 34-40018 (May 21, 1998) (the "1998 Release")).
[6] Staff Legal Bulletin 14A (July 12, 2002) ("SLB 14A").
[7] SLB 14K at § B.2. (quoting the 1998 Release).
[8] Staff Legal Bulletin 14C at § D.2.
[9] SLB 14A.

proposal can become a significant policy issue in just a matter of months.[10] Additionally, whether a proposal satisfies the significant policy exception "depends, in part, on the connection between the significant policy issue and the company's business operations."[11] The Staff thus "takes a company-specific approach in evaluating significance," where the focus is "on whether the proposal deals with a matter relating to that company's ordinary business operations or raises a policy issue that transcends that company's ordinary business operations."[12] If a proposal appears to raise a significant policy issue, "a company's no-action request should focus on the significance of the issue to that company. If the company does not meet that burden, the staff believes the matter may not be excluded under Rule 14a-8(i)(7)."[13]

The Proposal Focuses on a Significant Policy Issue
for the Company that Transcends Ordinary Business

Dollar General argues that the Proposal is excludable under Rule 14a-8(i)(7) because it relates to the Company's management of its workforce and does not focus on a significant policy issue that transcends ordinary business operations. Even though the subject matter of the Proposal concerns a particular type of contractual device used to direct employee-related disputes into private arbitration, it is precisely the pervasive use of this device by Dollar General and other large employers that has become a significant policy issue that transcends ordinary business operations. As discussed in greater detail below, whether the largely unconstrained and expanding use of such provisions should continue unabated is a hotly-debated issue by politicians at the highest levels of federal and state government, legal academics and researchers, and mainstream news organizations. The widespread public debate that has emerged, particularly in the past year, has transformed this into a significant policy issue that transcends ordinary business operations. Because Dollar General is an employer of over 140,000 employees and has made widespread use of mandatory arbitration provisions since 2014, the subject matter of this Proposal presents a policy issue that is significant for Dollar General. The Proposal is, therefore, not excludable under Rule 14a-8(i)(7).

A. The Mere Fact that the Proposal Relates to Dollar General's Management of its Workforce does not Compel the Exclusion of the Proposal

Dollar General first argues that the Proposal should be excluded because it "directly implicates" an ordinary business matter: the management of its workforce.[14] The Systems do not dispute that the Staff has previously concurred with the exclusion of proposals that concern subjects related to the nuts and bolts of workforce management, such as "procedures for terminating employees,"[15] "policies concerning [the speech of] its employees,"[16] "procedures for

[10] *See id.* ("We believe that the public debate regarding shareholder approval of equity compensation plans has become significant in recent months.").
[11] SLB 14K at § B.2.
[12] *Id.*
[13] *Id.*
[14] No-Action Request at 3-5.
[15] *Berkshire Hathaway Inc.* (Jan. 31, 2012) & *Northrop Grumman Corp.* (Mar. 18, 2010).
[16] *Bank of America Corp.* (Feb. 14, 2012).

hiring and promoting employees,"[17] and "procedures for hiring and training employees."[18] However, "[t]he fact that a proposal simply relates to ordinary business matters does not conclusively establish that a company may exclude the proposal from its proxy materials."[19] To the contrary, if a proposal focuses on a "significant policy issue" for the company, it is not excludable because the proposal would "'transcend … day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.'"[20] In light of the widespread public debate concerning the pervasive use of employment arbitration provisions by companies, which we discuss below, the use of such provisions has become a significant issue for the Company. The Systems thus have a right for the Proposal to be included in the Company's proxy materials.

B. Dollar General has not Demonstrated that Proposal Fails to Focus on a Significant Policy Issue that Transcends the Company's Ordinary Business Operations

Dollar General next contends that the Proposal should be excluded because it does not focus on a significant policy issue that transcends the Company's ordinary business operations.[21] Although Dollar General discusses a large number of previous no-action determinations to support its contention, only three of these—*CBRE Group, Inc.* (Mar. 6, 2019), *Amazon.com, Inc.* (Mar. 6, 2019) and *Yum! Brands, Inc.* (Mar. 6, 2019)—address proposals that concern a company's use of mandatory arbitration provisions. Accordingly, only these three determinations are potentially relevant here.

In *CBRE Group, Inc.*, the Staff was "unable to concur" with the company's contention that a proposal requesting a report on the impact of mandatory arbitration policies on its employees that included an evaluation of the risks that may result from the company's mandatory arbitration policy on claims of sexual harassment was excludable on ordinary business grounds. Instead, the Staff found that the proposal "transcends ordinary business matters."

Both *Amazon.com, Inc.* and *Yum! Brands, Inc.* concerned a proposal that urged directors to adopt a policy that the company would not "engage in any Inequitable Employment Practice." One of the several practices identified as being an "Inequitable Employment Practice" was "mandatory arbitration of employment-related claims." In both *Amazon.com, Inc.* and *Yum! Brands, Inc.*, the Staff concluded that the proposal "relates generally to the Company's policies concerning its employees, and does not focus on an issue that transcends ordinary business matters."

None of these three no-action determinations is dispositive here. *CBRE Group, Inc.* certainly makes clear that proposals concerning the use of mandatory arbitration provisions are not excludable simply because they involve or touch upon an "ordinary business" concern, like a

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[17] *Merck & Co., Inc.* (Mar. 6, 2015).
[18] *Starwood Hotels & Resorts Worldwide, Inc.* (Feb. 14, 2012).
[19] SLB 14A.
[20] SLB 14K, § B.2. (quoting the 1998 Release). *See also Amazon.com, Inc.* (Mar. 14, 2017) (refusing to concur in the exclusion on ordinary business grounds of a proposal requesting a report on the use of criminal background checks in hiring and employment decisions and the risk of racial discrimination resulting from such use).
[21] No-Action Request at 5-7.

company's management of its workface. In fact, the Staff's determination in *CBRE Group, Inc.* shows that the use of mandatory arbitration provisions can present a significant policy issue. However, what remains unclear from *CBRE Group, Inc.* is whether the Staff found the proposal to transcend ordinary business because its focus was limited to the use of mandatory arbitration (as opposed to the more varied assortment of employment-related policies at issue in *Amazon.com, Inc.* and *Yum! Brands, Inc.*), or because the focus on mandatory arbitration was itself further linked to the risks created by the mandatory arbitration of sexual harassment claims. Likewise, it is not clear from *Amazon.com, Inc.* and *Yum! Brands, Inc.* whether the proposals were excludable because one or more of the various employment policies identified were significant policy issues, but had been lumped together with others polices that presented only ordinary business concerns,[22] or because each and every employment policy identified was a matter of ordinary business. Regardless, even if the Staff was not prepared to find that the use of mandatory arbitration provisions presented a significant policy issue when it decided *Amazon.com, Inc.* and *Yum! Brands, Inc.* in March 2019, further developments since those determinations demonstrate that the issue has now become a significant policy issue.

C. The Widespread Use of Contractual Provisions Requiring Employees to Arbitrate Employment-Related Claims Has Itself Become a Significant Policy Issue

The SEC recognized in its 1998 Release that there was a deep interest "among shareholders in having an opportunity to express their views to company management on employment-related proposals that raise sufficiently significant social policy issues."[23] Since that time, the touchstone for whether a shareholder proposal raises a significant policy issue is whether the issue has emerged "as a consistent topic of widespread public debate."[24] As set forth below, there is more than sufficient evidence for the Staff to conclude that the use of contractual provisions requiring employees to arbitrate their employment-related claims has become a consistent topic of widespread public debate, and thus an issue that transcends ordinary business operations. As one recent article noted, "[s]tate legislative enactments prohibiting the use of mandatory arbitration with employees continue to roll out as legislatures face pressure from their constituents. The pressure is also erupting in recent headlines, which put a spotlight on mandatory arbitration provisions. Arguments against the use of mandatory arbitration provisions have now even made their way into the Presidential debates. Undoubtedly, in light of pressure from employees, scrutiny from the public, and the increasing litany of statutory prohibitions, some employers—such as Google, Uber (for sexual misconduct claims), and Microsoft (for gender discrimination and harassment)—are eliminating or reducing mandatory arbitration of discrimination claims."[25]

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[22] As Dollar General notes, the Staff has found proposals excludable where a proposal implicates both a significant policy issue and ordinary business matters. *See* No-Action Request at 6.
[23] 1998 Release at § III.
[24] *Id.*
[25] Lauri F. Rasnick, "It's Time to Revisit Your Arbitration Agreements: Limitations on Mandatory Arbitration Provisions Continue to Spread Throughout the Country," *The National Law Review* (Nov. 22, 2019), *available at* https://www.natlawreview.com/article/it-s-time-to-revisit-your-arbitration-agreements-limitations-mandatory-arbitration.

1. Why is the Use of Arbitration Provisions in Employment Contracts So Controversial?

Before reviewing evidence that the use of contractual provisions requiring employees to arbitrate their employment-related claims has emerged as a consistent topic of widespread public debate, it is helpful to understand exactly why this issue has attracted so much recent public attention.

First, employees who are subject to these provisions are generally barred from having their employment-related claims heard in court. For example, Dollar General's standard employee arbitration agreement, discussed in a recent case before the Mississippi Supreme Court, requires the arbitration of all "claims alleging violations of wage and hour laws, state and federal laws prohibiting discrimination, harassment, and retaliation, claims for defamation or violation of confidentiality obligations, claims for wrongful termination, tort claims, and claims alleging violation of any other state or federal laws ...."[26] This is significant because research has shown that the two forums—court vs. arbitration—are not equal, as "employees are less likely to win arbitration cases and they recover lower damages in mandatory employment arbitration than in the courts. Indeed, employers have a significant advantage in the process given that they are the ones who define the mandatory arbitration procedures and select the arbitration providers."[27]

Second, contractual arbitration provisions funnel disputes into "hermetically-sealed, secret proceedings" that deny the public (and other employees who may have similar experiences and claims) "the transparency, openness and accountability that are central to our civil justice system."[28] As a result of the "profound secrecy it offers to entities eager to avoid both liability and bad press, forced arbitration allows wrongful conduct to continue undetected and unremedied long after such illegality would otherwise come to light."[29] The secrecy of arbitration is especially troubling "when companies use forced arbitration clauses to conceal pervasive sexual harassment," which has the effect of "allowing sexual predators to operate with virtual impunity."[30]

Third, nearly all employee arbitration agreements "bar class and collective litigation—procedures established for the very purpose of enabling victims of small-value harms to band together to vindicate their rights." [31] This means that a company can effectively eliminate its liability for certain types of smaller, individual claims as long as it does not make financial sense for an employee to pursue such a claim individually. Dollar General's standard employee

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[26] *Keyes v. Dollar General Corp.*, 240 So.3d 373, 375 (Miss. 2018).
[27] Alexander J.S. Colvin, "The Growing Use of Mandatory Arbitration," at 3 (Apr. 6, 2018), *available at* https://www.epi.org/files/pdf/144131.pdf. *See also* Katherine V.W. Stone & Alexander J.S. Colvin, "The Arbitration Epidemic," at 18-23 (Dec. 7, 2015), *available at* https://www.epi.org/files/2015/arbitration-epidemic.pdf.
[28] Myriam Gilles, "(Forced) Arbitration in America: Suppressing Claims, Undermining Corporate Accountability, and Perpetuating Injustice," at 3 (Apr. 2, 2019), *available at* https://www.judiciary.senate.gov/imo/media/doc/Gilles%20Testimony.pdf.
[29] *Id.* at 4.
[30] *Id.* at 6.
[31] *Id.* at 2-3.

arbitration agreement appears to bar class and collective litigation.[32] Dollar General is not alone in this practice though, as it is now estimated that over 23% of private-sector nonunion employees, or 24.7 million American workers, "no longer have the right to bring a class action claim if their employment rights have been violated."[33]

Fourth, despite the risks and controversy surrounding the arbitration of employment-related claims, the use of such provisions continues to grow unchecked. In 1992, just 2% of the American workforce was subject to mandatory arbitration. By the early 2000s, that figure had increased to almost a quarter of workforce. It now exceeds 55%.[34] For employers with over 5,000 employees—such as Dollar General—over 67% now require their employees to arbitrate their employment-related claims.[35]

Fifth, the use of contractual provisions requiring employees to arbitrate employment-related claims "is more common in low-wage workplaces. It is also more common in industries that are disproportionately composed of women workers and in industries that are disproportionately composed of African American workers."[36]

Sixth, the use of contractual provisions requiring arbitration "has a tendency to suppress claims. Attorneys who represent employees are less likely to take on clients who are subject to mandatory arbitration, given that arbitration claims are less likely to succeed than claims brought to court, and, when damages are awarded, they are likely to be significantly smaller than court-awarded damages. Attorney reluctance to handle such claims effectively reduces the number of claims that are brought since, in practice, relatively few employees are able to bring employment law claims without the help of an attorney."[37] This is especially true for lower-paid employees, since their potential recovery will be lower in many instances than similar claims for higher-paid employees.

2. Leading Democratic Presidential Candidates and the Trump Administration Have All Articulated Policy Positions in the Public Debate

We now turn to the abundant evidence that the use of contractual provisions requiring employees to arbitrate their employment-related claims has become a consistent topic of widespread public debate. Perhaps no better evidence of this can be found than in the fact that three of the leading candidates for the Democratic presidential nomination—Elizabeth Warren, Joe Biden, and Bernie Sanders—all consider the use of mandatory arbitration provisions to be such a significant policy issue that it warrants inclusion in their official campaign platforms:

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[32] *Fielding v. Dolgen, LLC*, 17-cv-561, 2018 WL 3091012, *1 (E.D. Va. June 21, 2018) (identifying and quoting the "Class and Collective Action Waiver" from Dollar General's Arbitration Agreement, which bars the assertion of "any class action, collective action, or representative action claims in any arbitration pursuant to this agreement or in any other forum").
[33] Colvin, "The Growing Use of Mandatory Arbitration," at 2.
[34] *Id.* at 1.
[35] *Id.* at 6.
[36] *Id.*
[37] *Id.* at 10.

- Elizabeth Warren: "Many employers require workers to sign employment contracts that force them into arbitration over any employment-related dispute and prevent them from banding together in class action lawsuits against their employers. These provisions make it harder for workers to challenge wage theft, harassment, and discrimination. I will immediately prohibit federal contractors from including these agreements in their employment contracts, and I will push for a new federal law to ban them for all employers."[38]

- Joe Biden: "Biden will enact legislation to ban employers from requiring their employees to agree to mandatory individual arbitration."[39]

- Bernie Sanders: "Mandatory arbitration clauses prevent workers and consumers from having their day in court. In 1992, roughly 2 percent of the workforce were bound by mandatory arbitration. By 2000, that number had risen to 25 percent. Now, it's 55 percent. Nearly two-thirds of workers making less than $13 an hour are subject by mandatory arbitration clauses, including majorities of women, Hispanic, and African-American workers. As president, Bernie will ban mandatory arbitration clauses."[40]

Various news outlets have taken notice of the increased focus in the presidential campaign on mandatory arbitration requirements in employment contracts.[41]

The Trump Administration has also joined the public debate by articulating its own policy position. Three days before the House of Representatives passed the Forced Arbitration Injustice Repeal Act (the "FAIR Act") (discussed in more detail below), the Trump Administration issued a Statement of Administration Policy, announcing:

> "The Administration strongly opposes passage of [the FAIR Act]. This bill would prohibit private businesses from entering into predispute arbitration agreements, including those allowing for the use of collective arbitration procedures. These blanket prohibitions will increase litigation, costs, and inefficiency, including by exposing the vast majority of businesses to even more unnecessary litigation. As written, the FAIR Act disregards the benefits of resolving disputes through arbitration, including lower costs, faster resolution, and reduced burden on the judiciary. By limiting contractual options, this bill would hurt businesses and the very consumers

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[38] https://elizabethwarren.com/plans/empowering-american-workers (last visited Feb. 4, 2020).
[39] https://joebiden.com/empowerworkers/ (last visited Feb. 4, 2020).
[40] https://berniesanders.com/issues/corporate-accountability-and-democracy/ (last visited Feb. 4, 2020).
[41] *See, e.g.*, Noam Scheiber, "Candidates grow bolder on labor, and not just Bernie Sanders," *New York Times* (Oct. 11, 2019), *available at* https://www.nytimes.com/2019/10/11/business/economy/democratic-candidates-labor-unions.html?searchResultPosition=13; Alexia Fernandez Campbell, "The boldest and weakest labor platforms of the 2020 Democratic Party," *Vox* (Oct. 29, 2019), *available at* https://www.vox.com/2019/9/5/20847614/democratic-debate-candidate-labor-platforms; Alice M. Ollstein, "Democrats dogged by staff scandals back workplace harassment crackdown," *Politico* (Apr. 9, 2019), *available at* https://www.politico.com/story/2019/04/09/2020-election-workplace-harassment-1263551.

> and employees it seeks to protect. If [the FAIR Act] were presented to the President in its current form, his advisors would recommend that he veto the bill."[42]

3. Both the House and the Senate Have Recognized the Significance of the Issue

Additional evidence of the existence of a widespread public debate on the use of contractual provisions requiring employees to arbitrate employment-related claims comes from the fact that there have already been two congressional hearings on this issue in past year. On April 2, 2019, the Senate Judiciary Committee held a hearing entitled "Arbitration in America,"[43] and on May 16, 2019, the House Committee on the Judiciary held a hearing entitled "Justice Denied: Forced Arbitration and the Erosion of our Legal System."[44] Both of these hearings included substantial testimony on the widespread use of contractual provisions requiring employees to arbitrate their employment-related claims.

These two hearings followed upon the February 28, 2019 introduction in the House of Representatives of the FAIR Act (with 147 co-sponsors) and a companion bill in the Senate (with 34 co-sponsors).[45] Among other things, the FAIR Act would prohibit a pre-dispute arbitration agreement from being valid or enforceable if it requires the arbitration of an employment dispute.[46] On September 27, 2019, the House voted 225 to 186 to pass the FAIR Act and it is currently pending in the Senate.[47]

The FAIR Act did not come out of the blue. In February 2018, *every attorney general in America* signed a letter sent to House and Senate leaders calling for legislation that would bar employers from requiring the arbitration of sexual harassment claims.[48] A year later, in February 2019, Illinois Representative Cheri Bustos, with bipartisan sponsorship, introduced the Ending Forced Arbitration of Sexual Harassment Act of 2019, which would prohibit pre-dispute

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[42] Executive Office of the President, Statement of Administration Policy (Sept. 17, 2019) (emphasis in original), *available at* https://www.whitehouse.gov/wp-content/uploads/2019/09/SAP_HR-1423.pdf.

[43] Arbitration in America: Hearing Before the Senate Committee on the Judiciary (Apr. 2, 2019). Full hearing materials are available at https://www.judiciary.senate.gov/meetings/arbitration-in-america. *See also* Alexia Fernandez Campbell, "Democrats want to ban mandatory arbitration at work. Senate Republicans are listening," *Vox* (Apr. 3, 2019), *available at* https://www.vox.com/2019/4/3/18292168/forced-arbitration-senate-bill-hearing.

[44] Justice Denied: Forced Arbitration and the Erosion of our Legal System (May 16, 2019). Full hearing materials are available at https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=1813.

[45] Hank Johnson Press Release, "Rep. Johnson, Sen. Blumenthal Introduce Legislation to End Forced Arbitration and Restore Accountability for Consumers, Workers," (Feb. 28, 2019), available at https://hankjohnson.house.gov/media-center/press-releases/rep-johnson-sen-blumenthal-introduce-legislation-end-forced-arbitration.

[46] H.R. 1423 – Forced Arbitration Injustice Repeal Act, *available at* https://www.congress.gov/bill/116th-congress/house-bill/1423.

[47] Andrew Keshner, "Congress could rewrite the rules on forced arbitration – 3 reasons every American should care," *Marketwatch* (Sept. 27, 2019), *available at* https://www.marketwatch.com/story/congress-could-rewrite-the-rules-on-forced-arbitration-here-are-3-ways-it-affects-consumers-and-workers-that-you-might-not-be-aware-of-2019-09-24.

[48] National Association of Attorneys General, Letter concerning Mandatory Arbitration of Sexual Harassment Disputes (Feb. 28, 2019), *available at* http://myfloridalegal.com/webfiles.nsf/WF/HFIS-AVWMYN/$file/NAAG+letter+to+Congress+Sexual+Harassment+Mandatory+Arbitration.pdf.

arbitration agreements from being valid or enforceable if they required arbitration of a sexual discrimination claim.[49]

As these various Congressional actions demonstrate, members of Congress clearly recognize the pressing significance and public outcry concerning the issues raised by the use of contractual provisions requiring employees to arbitrate their employment-related claims.

4. States have Passed Legislation Limiting or Barring Mandatory Arbitration

Not willing to wait for a federal solution to the pressing issues presented by the use of arbitration provisions in the employment context, numerous states have stepped into the public debate and enacted legislation limiting or banning mandatory arbitration of employment-related claims. Such actions further demonstrate that the issue has become sufficiently significant to transcend ordinary business operations.

On October 10, 2019, California Governor Gavin Newsom signed into law Assembly Bill 51, which prohibits employers within California from "requiring any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act or other specific statutes governing employment as a condition of employment, continued employment, or the receipt of any employment-related benefit." [50] The enactment of this law attracted significant national attention.[51]

California's recent actions follow upon similar measures taken in other states. In 2018, New York enacted legislation restricting the use of mandatory arbitration clauses in connection with claims of sexual harassment.[52] In March 2018, Washington enacted legislation voiding provisions in employment contracts that required employees to waive their right to publicly pursue a discrimination claim under state or federal law, as well as provisions that required an employee to resolve discrimination claims in a confidential dispute resolution process.[53]

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[49] H.R. 1443 – Ending Forced Arbitration of Sexual Harassment Act of 2019, available at https://www.congress.gov/bill/116th-congress/house-bill/1443.

[50] California Assembly Bill No. 51, *available at* http://www.leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB51.

[51] *See, e.g.*, Megan McCarty Carino, "California gives more workers the right to sue for workplace harassment, discrimination," *Marketplace*, Oct. 11, 2019, *available at* https://www.marketplace.org/2019/10/11/california-outlaws-forced-arbitration-win-workers-rights/; Alexia Fernandez Campbell, "California finally bans forced arbitration at work," *Vox*, Oct. 11, 2019, *available at* https://www.vox.com/identities/2019/10/11/20909589/california-forced-arbitration-bill-ab-51; and Michael S. Kun & Kevin Sullivan, "California Governor signs legislation outlawing mandatory arbitration agreements with employees," *The National Law Review*, Oct. 11, 2019, *available at* https://www.natlawreview.com/article/california-governor-signs-legislation-outlawing-mandatory-arbitration-agreements.

[52] Robert Heary & Michael Sciotti, "New York enacts sweeping sexual harassment legislation," *Buffalo Law Journal* (June 6, 2018), *available at* https://www.bizjournals.com/buffalo/news/2018/06/26/column-new-york-enacts-sweeping-sexual-harassment.html.

[53] Adam T. Pankratz & Kyle D. Nelson, "#MeToo Comes to Washington State" (Mar. 27, 2018), *available at* https://ogletree.com/insights/2018-03-27/metoo-comes-to-washington-state/.

Maryland, New Jersey and Vermont have also passed legislation targeted at the use of mandatory arbitration in the employment context.[54]

5. Mandatory Arbitration is a Topic of Widespread Debate in the News Media and among Legal Academics and Researchers

Finally, the use of contractual provisions requiring employees to arbitrate their employment-related claims has been the subject of a wealth of news coverage, as well as legal and academic research. The following is just a *small sample* of some of that recent coverage and research, and serves to further substantiate the conclusion that the subject matter of the Proposal has become a significant policy issue.

- Editorial/Opinion Articles:
  - Nan Aron & Celine McNicholas, "The Trump administration is decimating workers' rights," *CNN* (Aug. 27, 2019), *available at* https://www.cnn.com/2019/08/27/perspectives/forced-arbitration/index.html
  - Matthew Finkin, "Dealing with harassment? Discrimination? Wage theft? Good luck getting justice with mandatory arbitration," *Los Angeles Times* (Feb. 9, 2018), *available at* https://www.latimes.com/opinion/op-ed/la-oe-finkin-forced-arbitration-20180209-story.html
  - Sarah Staszak, "Google workers want to outlaw mandatory arbitration. Here's why this matters," *The Washing Post* (May 3, 2019), *available at* https://www.washingtonpost.com/politics/2019/05/03/google-workers-want-outlaw-mandatory-arbitration-heres-why-this-matters/
  - Rakeen Mabud, "New Mandatory Arbitration Legislation is a Great Step, but not a Cure-all," *Forbes* (Sept. 26, 2019), *available at* https://www.forbes.com/sites/rakeenmabud/2019/09/26/new-mandatory-arbitration-legislation-is-a-great-step-but-not-a-cure-all/#356cfdf33dc2
  - Mark Stern, "The Decade Class Actions were Gutted," *Slate* (Dec. 18, 2019), *available at* https://slate.com/news-and-politics/2019/12/decade-class-action-was-gutted.html
  - Helaine Olen, "The Supreme Court just made it easier on employers – and harder on workers," *The Washington Post* (May 21, 2018), *available at* https://www.washingtonpost.com/blogs/plum-line/wp/2018/05/21/the-supreme-court-just-made-it-easier-on-employers-and-harder-on-workers/
  - Alexia Fernandez Campbell & Alvin Chang, "There's a good chance you've waived the right to sue your boss," *Vox* (Sept. 7, 2018), *available at* https://www.vox.com/2018/8/1/16992362/sexual-harassment-mandatory-arbitration
  - InvestmentNews, "Time to end mandatory arbitration," *InvestmentNews* (Jan. 3, 2020), *available at* https://www.investmentnews.com/time-to-end-mandatory-arbitration-2-175854

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[54] *See* Gena B. Usenheimer, Anne R. Dana & Vlada Feldman, "#MeToo Inspires Legislative Changes Across the United States" (Mar. 28, 2019), *available at* https://www.seyfarth.com/news-insights/metoo-inspires-legislative-changes-across-the-united-states.html.

- Scott McCleskey, "Mandatory arbitration is bad policy and bad for business," *Reuters* (Nov. 27, 2017), *available at* https://www.reuters.com/article/bc-finreg-mandatory-arbitration/commentary-mandatory-arbitration-is-bad-policy-and-bad-for-business-idUSKBN1DS00P
- Debra S. Katz, "30 million women can't sue their employer over harassment. Hopefully that's changing," *The Washington Post* (May 17, 2018), *available at* https://www.washingtonpost.com/opinions/companies-are-finally-letting-women-take-sexual-harassment-to-court/2018/05/17/552ca876-594e-11e8-b656-a5f8c2a9295d_story.html

- General News Articles:
  - Andrew Keshner, "The number or workers suing their employers fell last year for the first time in 16 years – why you should be concerned," *MarketWatch* (Jan. 8, 2020), *available at* https://www.marketwatch.com/story/employees-arent-suing-their-workplaces-as-often-as-they-used-to-but-is-that-necessarily-a-good-thing-2020-01-07
  - Jena McGregor, "Google and Facebook ended forced arbitration for sexual harassment claims. Why more companies could follow," *The Washington Post* (Nov. 12, 2018), *available at* https://www.washingtonpost.com/business/2018/11/12/google-facebook-ended-forced-arbitration-sex-harassment-claims-why-more-companies-could-follow/
  - Alexia Fernandez Campbell, "Google employees walked out for the right to sue their bosses. Now they're taking the fight to Congress," *Vox* (Feb. 28, 2019), *available at* https://www.vox.com/policy-and-politics/2019/2/28/18244686/google-employees-forced-arbitration-bill-congress
  - Alexia Fernandez Campbell, "Democrats want to ban mandatory arbitration at work. Senate Republicans are listening," *Vox* (Apr. 3, 2019), *available at* https://www.vox.com/2019/4/3/18292168/forced-arbitration-senate-bill-hearing
  - Alexia Fernandez Campbell, "House Democrats have a sweeping plan to protect millions of workers' legal rights," *Vox* (Nov. 14, 2018), *available at* https://www.vox.com/policy-and-politics/2018/11/14/18087490/mandatory-arbitration-house-democrats
  - Alexia Fernandez Campbell, "Female law students pressure firms to stop banning sexual harassment suits," *Vox* (Dec. 3, 2018), *available at* https://www.vox.com/2018/12/3/18123798/womens-student-association-mandatory-arbitration
  - Alexia Fernandez Campbell, "The House just passed a bill that would give millions of workers the right to sue their boss," *Vox* (Sept. 20, 2019), *available at* https://www.vox.com/identities/2019/9/20/20872195/forced-mandatory-arbitration-bill-fair-act
  - Michael Hobbes, "It's shockingly easy for your boss to steal from you and get away with it," *HuffPost* (June 8, 2019), *available at*

https://www.huffpost.com/entry/wage-theft-employers-stealing_n_5cfa7c1ae4b045133e6057a1
- Sejal Singh & Andre Manuel, "Harvard Law Students Are Taking on Forced Arbitration," *The Nation* (Apr. 15, 2019), *available at* https://www.thenation.com/article/archive/harvard-law-students-are-taking-on-forced-arbitration/
- "McDonald's Raises the Level of Transparency on Forced Arbitration Policies for All Companies," *CSRwire* (Apr. 16, 2019), *available at* https://www.csrwire.com/press_releases/41884-McDonald-s-Raises-the-Level-of-Transparency-on-Forced-Arbitration-Policies-for-All-Companies
- Daisuke Wakabayashi, "Google Ends Forced Arbitration for All Employee Disputes," *New York Times* (Feb. 21, 2019), *available at* https://www.nytimes.com/2019/02/21/technology/google-forced-arbitration.html
- Alexia Fernandez Campbell, "Google employees fought for their right to sue the company – and won," *Vox* (Feb. 22, 2019), *available at* https://www.vox.com/technology/2019/2/22/18236172/mandatory-forced-arbitration-google-employees
- Stephanie Russell-Kraft, "DLA Piper hit by law student protests over arbitration," *Bloomberg Law* (Oct. 10, 2019), *available at* https://biglawbusiness.com/dla-piper-offices-hit-by-law-student-protests-over-arbitration
- Stephanie Russell-Kraft, "Kirkland & Ellis drops arbitration for non-attorney staff," *Bloomberg Law* (Dec. 7, 2018), *available at* https://biglawbusiness.com/kirkland-ellis-drops-arbitration-for-non-attorney-staff
- Stephanie Russell-Kraft, "LGBTQ students refuse funds from law firms with arbitration," *Bloomberg Law* (Nov. 6, 2019), *available at* https://news.bloomberglaw.com/us-law-week/lgbtq-students-refuse-funds-from-law-firms-with-arbitration
- Brianna Holt, "Why forced arbitration policies are a huge red flag for women at work," *Quartz* (Sept. 19, 2019), *available at* https://qz.com/1711352/what-is-forced-arbitration-and-why-should-women-be-wary-of-it/
- Dave Jamieson, "Chipotle's Mandatory Arbitration Agreements Are Backfiring Spectacularly," *HuffPost* (Dec. 21, 2018), *available at* https://www.huffpost.com/entry/chipotle-mandatory-arbitration-agreements_n_5c1bda0de4b0407e90787abd
- Greg Bensinger, "Uber Ends Mandatory Arbitration Clauses for Sexual-Harassment Claims," *The Wall Street Journal* (May 15, 2018), *available at* https://www.wsj.com/articles/uber-ends-mandatory-arbitration-clauses-for-sexual-harassment-claims-1526378400

- Legal and Academic Research
  - Alexander J.S. Colvin, "The Growing Use of Mandatory Arbitration," (Apr. 6, 2018), *available at* https://www.epi.org/files/pdf/144131.pdf.

- Katherine V.W. Stone & Alexander J.S. Colvin, "The Arbitration Epidemic," (Dec. 7, 2015), *available at* https://www.epi.org/files/2015/arbitration-epidemic.pdf.
- Economic Policy Institute, "Unchecked corporate power: Forced arbitration, the enforcement crisis, and how workers are fighting back" (May 2019), *available at* https://www.epi.org/files/uploads/Unchecked-Corporate-Power-web.pdf
- Cynthia Estlund, *The Black Hole of Mandatory Arbitration,* 96 N.C. L. Rev. 679 (2018), *available at* https://scholarship.law.unc.edu/nclr/vol96/iss3/3/
- Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. Ill. L. Rev. 371 (2016), *available at* https://illinoislawreview.org/wp-content/uploads/2016/05/Gilles.pdf
- Jean R. Sternlinght, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?*, 54 Harv. C.R.-C.L. L. Rev. 155 (2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3290361

D. The Use of Contractual Provisions Requiring Employees to Arbitrate Employment-Related Claims is a Significant Policy Issue for Dollar General

As noted above, the Staff "takes a company-specific approach in evaluating significance," and "a policy issue that is significant to one company may not be significant to another."[55] Here, basic publicly available information concerning Dollar General's specific use of contractual provisions requiring employees to arbitrate employment-related claims makes clear that the significant policy issues associated with the use of such provisions are also significant for the Company.

The No-Action Request states that the Company has more than 140,000 employees across 44 states.[56] It is quite likely that a large number of these 140,000 employees have agreed to submit nearly any employment-related claim they have to arbitration. Dollar General's Senior Director of Labor and Employment Law submitted sworn testimony that "*all employees* hired by Dollar General in and after August 2014 were presented with Dollar General's Employee Arbitration Agreement," with each employee having "the option of consenting to the agreement or opting out."[57] Although Dollar General maintains its employee arbitration agreement is "voluntary,"[58] employees that receive and fail to affirmatively opt-out of the agreement within 30 days are "bound by the Agreement."[59] The requirement that a Dollar General employee must affirmatively opt-out of the Company's arbitration agreement means that it is quite likely that many—if not most—of Dollar General's employees are subject to an arbitration agreement that, at best, they have limited knowledge of. Given these facts, the various debates swirling around the continued use of contractual arbitration provisions are significant for the Company.

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[55] SLB 14K at § B.2.
[56] No Action Request at 3.
[57] *Keyes v. Dollar General Corp.*, 240 So.3d 373, 375 (Miss. 2018).
[58] *Hubbard v. Dolgencorp, LLC*, 17-cv-1133, 2017 WL 4323588, *1 (W.D. Tenn. Sept. 28, 2017).
[59] *Arment v. Dolgencorp, LLC*, 18-cv-26, 2018 WL 5921369, *1 (E.D. Mo. Nov. 13, 2018).

E. The Company's Significance Analysis is Defective and Should be Disregarded

The Staff has advised that "evaluating whether a proposal transcends ordinary business matters" is a matter a company's board of directors "is well-situated to analyze," and that such an analysis "can assist the staff in evaluating a company's no-action request."[60] Accordingly, the Staff encourages companies to present a "well-developed discussion of the board's analysis of whether the particular policy issue raised by the proposal is sufficiently significant in relation to the company," and ensure that it describes "in sufficient detail the specific substantive factors the board considered in arriving at its conclusion."[61] Although the Staff does "not necessarily expect the board, or a board committee, to prepare the significance analysis that is included in the company's no-action request," it does advise that "it is important that the appropriate body with fiduciary duties to shareholders give due consideration as to whether the policy issue presented by a proposal is of significance to the company."[62]

Here, the No-Action Request states that while the Company's board was "notified" of the Proposal, it was actually the Compensation Committee—a committee composed of three of the Company's eight board members, and which, among other things, oversees general compensation matters, including the evaluation of shareholder proposals concerning executive compensation[63]—that "reviewed and considered" the Proposal and deliberated on it significance to the Company.[64] The Compensation Committee ultimately "concurred with management's view that ... the Proposal does not raise a significant policy issue that transcends the Company's ordinary business."[65] The full board was then "notified of the Committee's determination ... and concurred."[66]

There is nothing in the No-Action Request to indicate that the Company's full board—which is the "appropriate body with fiduciary duties to shareholders"—ever gave "due consideration" to whether the policy issue presented by the Proposal was of significance to the Company. To the contrary, consideration of the Proposal was delegated to the Compensation Committee, which then simply "notified" the full board of its "determination." There is no suggestion that, after receiving notice of the Compensation Committee's determination that the full board engaged in any sort of evaluation or discussion of the Compensation Committee's determination, much less the substantive analysis that led to the determination. All that the No-Action Request states is that the board "concurred" in the Compensation Committee's determination.

Furthermore, while the No-Action Request details the various substantive factors the Compensation Committee considered, absent from its description is a "well-developed discussion" of how these factors were weighed or how they individually or in combination with

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[60] SLB 14k at § B.3.
[61] *Id.*
[62] *Id.*
[63] *See* Dollar General Corporation Compensation Committee Charter, *available at* https://irpages2-preview.eqs.com/download/companies/dollargeneral/Committee%20Charters/Charter_Compensation_Committee.pdf.
[64] No Action Request at 8.
[65] *Id.* at 9.
[66] *Id.*

other factors warranted the Committee's final determination. Nor does it appear that the Compensation Committee considered the growing public and political debate about the widespread use of mandatory arbitration provisions and the relevance of that debate to the Company, given the Company's widespread use of arbitration.

Finally, it is not clear that the Compensation Committee was the committee best qualified to review the Proposal, as under its Charter it is tasked with dealing with executive and board compensation matters, which the Proposal does not concern. In contrast, Dollar General's Nominating and Governance Committee Charter tasks it with evaluating and making recommendations concerning shareholder proposals that relate to "social responsibility and sustainability."[67] Given the Proposal's connection to workers' rights, which falls under the broad rubric of social responsibility and sustainability, the board should have delegated the performance of the significance analysis to the Nominating and Governance Committee if it did not plan to conduct the analysis itself. Regardless of which board committee performed the analysis, the full board needed to give "due consideration" to that analysis for it to carry any weight. There is no indication that was done here.

For these reasons, the Company's significance analysis of the Proposal is defective and should not be accorded any weight.

Conclusion

For the reasons set forth above, Dollar General has not satisfied its burden of showing that it is entitled to omit the Proposal in reliance on Rule 14a-8(i)(7). The Systems thus respectfully request that Dollar General's No-Action Request be denied.

The Systems appreciate the opportunity to be of assistance in this matter. If you have any questions or need additional information, please contact me at (212) 669-2065.

Respectfully submitted,

Kathryn E. Diaz

Kathryn E. Diaz

cc: Christine L. Connolly
Corporate Secretary, Dollar General Corporation
sjulia@dollargeneral.com

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[67] Dollar General Corporation Nominating and Governance Committee Charter, *available at* https://irpages2-preview.eqs.com/download/companies/dollargeneral/Committee%20Charters/Charter_Nominating_and_Governance_Committee.pdf.

CITY OF NEW YORK
OFFICE OF THE COMPTROLLER
SCOTT M. STRINGER

KATHRYN E. DIAZ
GENERAL COUNSEL

OFFICE OF THE GENERAL COUNSEL

February 7, 2020

By e-mail: shareholderproposals@sec.gov

Securities and Exchange Commission
Office of the Chief Counsel
Division of Corporation Finance
100 F Street, NE
Washington, DC 20549

Re: Response to Dollar General Corporation's
January 9, 2020 No-Action Request

Dear Counsel:

I write on behalf of the New York City Employees' Retirement System, the New York City Teachers' Retirement System, the New York City Police Pension Fund and the New York City Fire Pension Fund (collectively, the "Systems") in response to the letter from Dollar General Corporation ("Dollar General" or the "Company"), dated January 9, 2020, stating that Dollar General intends to omit the Systems' shareholder proposal ("Proposal") from its 2020 proxy materials and seeking the concurrence of the staff of the Division of Corporate Finance ("Staff") on this intended omission (the "No-Action Request").[1] Dollar General has not met its burden of establishing that the Proposal is excludable under Rule 14a-8(i)(7) as a matter pertaining to the Company's "ordinary business operations." The subject matter of the Proposal—the use of contractual provisions requiring employees to arbitrate employment-related claims—has recently emerged as a significant policy issue that transcends Dollar General's ordinary business operations. As such, the Proposal cannot be excluded under the ordinary business exception. The Systems respectfully request that the Staff deny Dollar General's No-Action Request.

The Proposal and Supporting Statement

The Proposal[2] states:

"RESOLVED that shareholders of Dollar General Corporation. [sic] ("Dollar General") urge the Board of Directors to report to shareholders, at reasonable cost and omitting confidential and proprietary information, on the use of contractual provisions requiring

[1] The Comptroller of the City of New York is the custodian, investment advisor, and a trustee of the Systems and the Systems' Boards of Trustees have authorized the Comptroller to file the Proposal on their behalf.
[2] Dollar General attached the Proposal and Supporting Statement as Exhibit A to the No-Action Request.

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employees of Dollar General to arbitrate employment-related claims. The report should specify the proportion of the workforce subject to such provisions; the number of employment-related arbitration claims initiated and decided in favor of the employee, in each case in the previous calendar year; and any changes in policy or practice Dollar General has made, or intends to make, as a result of California's ban on agreeing to arbitration as a condition of employment."

The Supporting Statement helps explain why the Proposal presents a significant policy issue for Dollar General. Contractual provisions requiring employees to arbitrate employment-related claims—which Dollar General makes widespread use of—preclude "employees from suing in court for wrongs like wage theft, discrimination and harassment, and require[] them to submit to private arbitration." Because arbitration is private and contractual in nature, and often subject to confidentiality requirements, the arbitration of "employment-related claims can allow a toxic culture to flourish, increasing the severity of eventual consequences and harming employee morale." Various high-profile sexual harassment cases at large employers such as Fox News, Google and Uber have served to focus "public attention … on the use by companies of agreements requiring employees to pursue employment-related claims, including sexual harassment claims, through arbitration." In response to these cases, a "robust public debate has ensued, including responses by legislators, regulators and state attorneys general."

<u>The Analytical Framework</u>

The "ordinary business" exception permits a company to exclude a proposal that "deals with a matter relating to the company's ordinary business operations."[3] The applicability of this exception rests on two considerations: (1) the "proposal's subject matter," and (2) "the degree to which the proposal 'micromanages' the company."[4]

With respect to the "subject matter" consideration—which is the only basis for exclusion invoked by Dollar General—shareholder proposals are excludable if they "raise matters 'so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight.'"[5] However, "[t]he fact that a proposal relates to ordinary business matters does not conclusively establish that a company may exclude the proposal from its proxy materials."[6] Rather, proposals that relate to ordinary business matters, but which nevertheless "focus[] on a significant policy issue," are not excludable "'because the proposals would transcend the day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.'"[7]

In determining whether a policy issue has become sufficiently "significant," the Commission examines "the proposal and the supporting statement as a whole,"[8] and determines whether there is "widespread public debate regarding [the] issue."[9] The subject matter of a

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[3] Rule 14a-(8)(i)(7).
[4] Staff Legal Bulletin 14K (Oct. 16, 2019) ("SLB 14K") at § B.1.
[5] *Id.* at § B.2. (quoting Exchange Act Release No. 34-40018 (May 21, 1998) (the "1998 Release")).
[6] Staff Legal Bulletin 14A (July 12, 2002) ("SLB 14A").
[7] SLB 14K at § B.2. (quoting the 1998 Release).
[8] Staff Legal Bulletin 14C at § D.2.
[9] SLB 14A.

proposal can become a significant policy issue in just a matter of months.[10] Additionally, whether a proposal satisfies the significant policy exception "depends, in part, on the connection between the significant policy issue and the company's business operations."[11] The Staff thus "takes a company-specific approach in evaluating significance," where the focus is "on whether the proposal deals with a matter relating to that company's ordinary business operations or raises a policy issue that transcends that company's ordinary business operations."[12] If a proposal appears to raise a significant policy issue, "a company's no-action request should focus on the significance of the issue to that company. If the company does not meet that burden, the staff believes the matter may not be excluded under Rule 14a-8(i)(7)."[13]

The Proposal Focuses on a Significant Policy Issue
<u>for the Company that Transcends Ordinary Business</u>

Dollar General argues that the Proposal is excludable under Rule 14a-8(i)(7) because it relates to the Company's management of its workforce and does not focus on a significant policy issue that transcends ordinary business operations. Even though the subject matter of the Proposal concerns a particular type of contractual device used to direct employee-related disputes into private arbitration, it is precisely the pervasive use of this device by Dollar General and other large employers that has become a significant policy issue that transcends ordinary business operations. As discussed in greater detail below, whether the largely unconstrained and expanding use of such provisions should continue unabated is a hotly-debated issue by politicians at the highest levels of federal and state government, legal academics and researchers, and mainstream news organizations. The widespread public debate that has emerged, particularly in the past year, has transformed this into a significant policy issue that transcends ordinary business operations. Because Dollar General is an employer of over 140,000 employees and has made widespread use of mandatory arbitration provisions since 2014, the subject matter of this Proposal presents a policy issue that is significant for Dollar General. The Proposal is, therefore, not excludable under Rule 14a-8(i)(7).

A. The Mere Fact that the Proposal Relates to Dollar General's Management of its Workforce does not Compel the Exclusion of the Proposal

Dollar General first argues that the Proposal should be excluded because it "directly implicates" an ordinary business matter: the management of its workforce.[14] The Systems do not dispute that the Staff has previously concurred with the exclusion of proposals that concern subjects related to the nuts and bolts of workforce management, such as "procedures for terminating employees,"[15] "policies concerning [the speech of] its employees,"[16] "procedures for

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[10] *See id.* ("We believe that the public debate regarding shareholder approval of equity compensation plans has become significant in recent months.").
[11] SLB 14K at § B.2.
[12] *Id.*
[13] *Id.*
[14] No-Action Request at 3-5.
[15] *Berkshire Hathaway Inc.* (Jan. 31, 2012) & *Northrop Grumman Corp.* (Mar. 18, 2010).
[16] *Bank of America Corp.* (Feb. 14, 2012).

hiring and promoting employees,"[17] and "procedures for hiring and training employees."[18] However, "[t]he fact that a proposal simply relates to ordinary business matters does not conclusively establish that a company may exclude the proposal from its proxy materials."[19] To the contrary, if a proposal focuses on a "significant policy issue" for the company, it is not excludable because the proposal would "'transcend … day-to-day business matters and raise policy issues so significant that it would be appropriate for a shareholder vote.'"[20] In light of the widespread public debate concerning the pervasive use of employment arbitration provisions by companies, which we discuss below, the use of such provisions has become a significant issue for the Company. The Systems thus have a right for the Proposal to be included in the Company's proxy materials.

B. Dollar General has not Demonstrated that Proposal Fails to Focus on a Significant Policy Issue that Transcends the Company's Ordinary Business Operations

Dollar General next contends that the Proposal should be excluded because it does not focus on a significant policy issue that transcends the Company's ordinary business operations.[21] Although Dollar General discusses a large number of previous no-action determinations to support its contention, only three of these—*CBRE Group, Inc.* (Mar. 6, 2019), *Amazon.com, Inc.* (Mar. 6, 2019) and *Yum! Brands, Inc.* (Mar. 6, 2019)—address proposals that concern a company's use of mandatory arbitration provisions. Accordingly, only these three determinations are potentially relevant here.

In *CBRE Group, Inc.*, the Staff was "unable to concur" with the company's contention that a proposal requesting a report on the impact of mandatory arbitration policies on its employees that included an evaluation of the risks that may result from the company's mandatory arbitration policy on claims of sexual harassment was excludable on ordinary business grounds. Instead, the Staff found that the proposal "transcends ordinary business matters."

Both *Amazon.com, Inc.* and *Yum! Brands, Inc.* concerned a proposal that urged directors to adopt a policy that the company would not "engage in any Inequitable Employment Practice." One of the several practices identified as being an "Inequitable Employment Practice" was "mandatory arbitration of employment-related claims." In both *Amazon.com, Inc.* and *Yum! Brands, Inc.*, the Staff concluded that the proposal "relates generally to the Company's policies concerning its employees, and does not focus on an issue that transcends ordinary business matters."

None of these three no-action determinations is dispositive here. *CBRE Group, Inc.* certainly makes clear that proposals concerning the use of mandatory arbitration provisions are not excludable simply because they involve or touch upon an "ordinary business" concern, like a

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[17] *Merck & Co., Inc.* (Mar. 6, 2015).
[18] *Starwood Hotels & Resorts Worldwide, Inc.* (Feb. 14, 2012).
[19] SLB 14A.
[20] SLB 14K, § B.2. (quoting the 1998 Release). *See also Amazon.com, Inc.* (Mar. 14, 2017) (refusing to concur in the exclusion on ordinary business grounds of a proposal requesting a report on the use of criminal background checks in hiring and employment decisions and the risk of racial discrimination resulting from such use).
[21] No-Action Request at 5-7.

company's management of its workface. In fact, the Staff's determination in *CBRE Group, Inc.* shows that the use of mandatory arbitration provisions can present a significant policy issue. However, what remains unclear from *CBRE Group, Inc.* is whether the Staff found the proposal to transcend ordinary business because its focus was limited to the use of mandatory arbitration (as opposed to the more varied assortment of employment-related policies at issue in *Amazon.com, Inc.* and *Yum! Brands, Inc.*), or because the focus on mandatory arbitration was itself further linked to the risks created by the mandatory arbitration of sexual harassment claims. Likewise, it is not clear from *Amazon.com, Inc.* and *Yum! Brands, Inc.* whether the proposals were excludable because one or more of the various employment policies identified were significant policy issues, but had been lumped together with others polices that presented only ordinary business concerns,[22] or because each and every employment policy identified was a matter of ordinary business. Regardless, even if the Staff was not prepared to find that the use of mandatory arbitration provisions presented a significant policy issue when it decided *Amazon.com, Inc.* and *Yum! Brands, Inc.* in March 2019, further developments since those determinations demonstrate that the issue has now become a significant policy issue.

C. The Widespread Use of Contractual Provisions Requiring Employees to Arbitrate Employment-Related Claims Has Itself Become a Significant Policy Issue

The SEC recognized in its 1998 Release that there was a deep interest "among shareholders in having an opportunity to express their views to company management on employment-related proposals that raise sufficiently significant social policy issues."[23] Since that time, the touchstone for whether a shareholder proposal raises a significant policy issue is whether the issue has emerged "as a consistent topic of widespread public debate."[24] As set forth below, there is more than sufficient evidence for the Staff to conclude that the use of contractual provisions requiring employees to arbitrate their employment-related claims has become a consistent topic of widespread public debate, and thus an issue that transcends ordinary business operations. As one recent article noted, "[s]tate legislative enactments prohibiting the use of mandatory arbitration with employees continue to roll out as legislatures face pressure from their constituents. The pressure is also erupting in recent headlines, which put a spotlight on mandatory arbitration provisions. Arguments against the use of mandatory arbitration provisions have now even made their way into the Presidential debates. Undoubtedly, in light of pressure from employees, scrutiny from the public, and the increasing litany of statutory prohibitions, some employers—such as Google, Uber (for sexual misconduct claims), and Microsoft (for gender discrimination and harassment)—are eliminating or reducing mandatory arbitration of discrimination claims."[25]

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[22] As Dollar General notes, the Staff has found proposals excludable where a proposal implicates both a significant policy issue and ordinary business matters. *See* No-Action Request at 6.
[23] 1998 Release at § III.
[24] *Id.*
[25] Lauri F. Rasnick, "It's Time to Revisit Your Arbitration Agreements: Limitations on Mandatory Arbitration Provisions Continue to Spread Throughout the Country," *The National Law Review* (Nov. 22, 2019), *available at* https://www.natlawreview.com/article/it-s-time-to-revisit-your-arbitration-agreements-limitations-mandatory-arbitration.

1. Why is the Use of Arbitration Provisions in Employment Contracts So Controversial?

Before reviewing evidence that the use of contractual provisions requiring employees to arbitrate their employment-related claims has emerged as a consistent topic of widespread public debate, it is helpful to understand exactly why this issue has attracted so much recent public attention.

First, employees who are subject to these provisions are generally barred from having their employment-related claims heard in court. For example, Dollar General's standard employee arbitration agreement, discussed in a recent case before the Mississippi Supreme Court, requires the arbitration of all "claims alleging violations of wage and hour laws, state and federal laws prohibiting discrimination, harassment, and retaliation, claims for defamation or violation of confidentiality obligations, claims for wrongful termination, tort claims, and claims alleging violation of any other state or federal laws …."[26] This is significant because research has shown that the two forums—court vs. arbitration—are not equal, as "employees are less likely to win arbitration cases and they recover lower damages in mandatory employment arbitration than in the courts. Indeed, employers have a significant advantage in the process given that they are the ones who define the mandatory arbitration procedures and select the arbitration providers."[27]

Second, contractual arbitration provisions funnel disputes into "hermetically-sealed, secret proceedings" that deny the public (and other employees who may have similar experiences and claims) "the transparency, openness and accountability that are central to our civil justice system."[28] As a result of the "profound secrecy it offers to entities eager to avoid both liability and bad press, forced arbitration allows wrongful conduct to continue undetected and unremedied long after such illegality would otherwise come to light."[29] The secrecy of arbitration is especially troubling "when companies use forced arbitration clauses to conceal pervasive sexual harassment," which has the effect of "allowing sexual predators to operate with virtual impunity."[30]

Third, nearly all employee arbitration agreements "bar class and collective litigation—procedures established for the very purpose of enabling victims of small-value harms to band together to vindicate their rights." [31] This means that a company can effectively eliminate its liability for certain types of smaller, individual claims as long as it does not make financial sense for an employee to pursue such a claim individually. Dollar General's standard employee

[26] *Keyes v. Dollar General Corp.*, 240 So.3d 373, 375 (Miss. 2018).
[27] Alexander J.S. Colvin, "The Growing Use of Mandatory Arbitration," at 3 (Apr. 6, 2018), *available at* https://www.epi.org/files/pdf/144131.pdf. *See also* Katherine V.W. Stone & Alexander J.S. Colvin, "The Arbitration Epidemic," at 18-23 (Dec. 7, 2015), *available at* https://www.epi.org/files/2015/arbitration-epidemic.pdf.
[28] Myriam Gilles, "(Forced) Arbitration in America: Suppressing Claims, Undermining Corporate Accountability, and Perpetuating Injustice," at 3 (Apr. 2, 2019), *available at* https://www.judiciary.senate.gov/imo/media/doc/Gilles%20Testimony.pdf.
[29] *Id.* at 4.
[30] *Id.* at 6.
[31] *Id.* at 2-3.

arbitration agreement appears to bar class and collective litigation.[32] Dollar General is not alone in this practice though, as it is now estimated that over 23% of private-sector nonunion employees, or 24.7 million American workers, "no longer have the right to bring a class action claim if their employment rights have been violated."[33]

Fourth, despite the risks and controversy surrounding the arbitration of employment-related claims, the use of such provisions continues to grow unchecked. In 1992, just 2% of the American workforce was subject to mandatory arbitration. By the early 2000s, that figure had increased to almost a quarter of workforce. It now exceeds 55%.[34] For employers with over 5,000 employees—such as Dollar General—over 67% now require their employees to arbitrate their employment-related claims.[35]

Fifth, the use of contractual provisions requiring employees to arbitrate employment-related claims "is more common in low-wage workplaces. It is also more common in industries that are disproportionately composed of women workers and in industries that are disproportionately composed of African American workers."[36]

Sixth, the use of contractual provisions requiring arbitration "has a tendency to suppress claims. Attorneys who represent employees are less likely to take on clients who are subject to mandatory arbitration, given that arbitration claims are less likely to succeed than claims brought to court, and, when damages are awarded, they are likely to be significantly smaller than court-awarded damages. Attorney reluctance to handle such claims effectively reduces the number of claims that are brought since, in practice, relatively few employees are able to bring employment law claims without the help of an attorney."[37] This is especially true for lower-paid employees, since their potential recovery will be lower in many instances than similar claims for higher-paid employees.

2. Leading Democratic Presidential Candidates and the Trump Administration Have All Articulated Policy Positions in the Public Debate

We now turn to the abundant evidence that the use of contractual provisions requiring employees to arbitrate their employment-related claims has become a consistent topic of widespread public debate. Perhaps no better evidence of this can be found than in the fact that three of the leading candidates for the Democratic presidential nomination—Elizabeth Warren, Joe Biden, and Bernie Sanders—all consider the use of mandatory arbitration provisions to be such a significant policy issue that it warrants inclusion in their official campaign platforms:

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[32] *Fielding v. Dolgen, LLC*, 17-cv-561, 2018 WL 3091012, *1 (E.D. Va. June 21, 2018) (identifying and quoting the "Class and Collective Action Waiver" from Dollar General's Arbitration Agreement, which bars the assertion of "any class action, collective action, or representative action claims in any arbitration pursuant to this agreement or in any other forum").
[33] Colvin, "The Growing Use of Mandatory Arbitration," at 2.
[34] *Id.* at 1.
[35] *Id.* at 6.
[36] *Id.*
[37] *Id.* at 10.

- Elizabeth Warren: "Many employers require workers to sign employment contracts that force them into arbitration over any employment-related dispute and prevent them from banding together in class action lawsuits against their employers. These provisions make it harder for workers to challenge wage theft, harassment, and discrimination. I will immediately prohibit federal contractors from including these agreements in their employment contracts, and I will push for a new federal law to ban them for all employers."[38]

- Joe Biden: "Biden will enact legislation to ban employers from requiring their employees to agree to mandatory individual arbitration."[39]

- Bernie Sanders: "Mandatory arbitration clauses prevent workers and consumers from having their day in court. In 1992, roughly 2 percent of the workforce were bound by mandatory arbitration. By 2000, that number had risen to 25 percent. Now, it's 55 percent. Nearly two-thirds of workers making less than $13 an hour are subject by mandatory arbitration clauses, including majorities of women, Hispanic, and African-American workers. As president, Bernie will ban mandatory arbitration clauses."[40]

Various news outlets have taken notice of the increased focus in the presidential campaign on mandatory arbitration requirements in employment contracts.[41]

The Trump Administration has also joined the public debate by articulating its own policy position. Three days before the House of Representatives passed the Forced Arbitration Injustice Repeal Act (the "FAIR Act") (discussed in more detail below), the Trump Administration issued a Statement of Administration Policy, announcing:

> "The Administration strongly opposes passage of [the FAIR Act]. This bill would prohibit private businesses from entering into predispute arbitration agreements, including those allowing for the use of collective arbitration procedures. These blanket prohibitions will increase litigation, costs, and inefficiency, including by exposing the vast majority of businesses to even more unnecessary litigation. As written, the FAIR Act disregards the benefits of resolving disputes through arbitration, including lower costs, faster resolution, and reduced burden on the judiciary. By limiting contractual options, this bill would hurt businesses and the very consumers

[38] https://elizabethwarren.com/plans/empowering-american-workers (last visited Feb. 4, 2020).
[39] https://joebiden.com/empowerworkers/ (last visited Feb. 4, 2020).
[40] https://berniesanders.com/issues/corporate-accountability-and-democracy/ (last visited Feb. 4, 2020).
[41] *See, e.g.*, Noam Scheiber, "Candidates grow bolder on labor, and not just Bernie Sanders," *New York Times* (Oct. 11, 2019), *available at* https://www.nytimes.com/2019/10/11/business/economy/democratic-candidates-labor-unions.html?searchResultPosition=13; Alexia Fernandez Campbell, "The boldest and weakest labor platforms of the 2020 Democratic Party," *Vox* (Oct. 29, 2019), *available at* https://www.vox.com/2019/9/5/20847614/democratic-debate-candidate-labor-platforms; Alice M. Ollstein, "Democrats dogged by staff scandals back workplace harassment crackdown," *Politico* (Apr. 9, 2019), *available at* https://www.politico.com/story/2019/04/09/2020-election-workplace-harassment-1263551.

> and employees it seeks to protect. If [the FAIR Act] were presented to the President in its current form, his advisors would recommend that he veto the bill."[42]

3. Both the House and the Senate Have Recognized the Significance of the Issue

Additional evidence of the existence of a widespread public debate on the use of contractual provisions requiring employees to arbitrate employment-related claims comes from the fact that there have already been two congressional hearings on this issue in past year. On April 2, 2019, the Senate Judiciary Committee held a hearing entitled "Arbitration in America,"[43] and on May 16, 2019, the House Committee on the Judiciary held a hearing entitled "Justice Denied: Forced Arbitration and the Erosion of our Legal System."[44] Both of these hearings included substantial testimony on the widespread use of contractual provisions requiring employees to arbitrate their employment-related claims.

These two hearings followed upon the February 28, 2019 introduction in the House of Representatives of the FAIR Act (with 147 co-sponsors) and a companion bill in the Senate (with 34 co-sponsors).[45] Among other things, the FAIR Act would prohibit a pre-dispute arbitration agreement from being valid or enforceable if it requires the arbitration of an employment dispute.[46] On September 27, 2019, the House voted 225 to 186 to pass the FAIR Act and it is currently pending in the Senate.[47]

The FAIR Act did not come out of the blue. In February 2018, *every attorney general in America* signed a letter sent to House and Senate leaders calling for legislation that would bar employers from requiring the arbitration of sexual harassment claims.[48] A year later, in February 2019, Illinois Representative Cheri Bustos, with bipartisan sponsorship, introduced the Ending Forced Arbitration of Sexual Harassment Act of 2019, which would prohibit pre-dispute

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[42] Executive Office of the President, Statement of Administration Policy (Sept. 17, 2019) (emphasis in original), *available at* https://www.whitehouse.gov/wp-content/uploads/2019/09/SAP_HR-1423.pdf.
[43] Arbitration in America: Hearing Before the Senate Committee on the Judiciary (Apr. 2, 2019). Full hearing materials are available at https://www.judiciary.senate.gov/meetings/arbitration-in-america. *See also* Alexia Fernandez Campbell, "Democrats want to ban mandatory arbitration at work. Senate Republicans are listening," *Vox* (Apr. 3, 2019), *available at* https://www.vox.com/2019/4/3/18292168/forced-arbitration-senate-bill-hearing.
[44] Justice Denied: Forced Arbitration and the Erosion of our Legal System (May 16, 2019). Full hearing materials are available at https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=1813.
[45] Hank Johnson Press Release, "Rep. Johnson, Sen. Blumenthal Introduce Legislation to End Forced Arbitration and Restore Accountability for Consumers, Workers," (Feb. 28, 2019), available at https://hankjohnson.house.gov/media-center/press-releases/rep-johnson-sen-blumenthal-introduce-legislation-end-forced-arbitration.
[46] H.R. 1423 – Forced Arbitration Injustice Repeal Act, *available at* https://www.congress.gov/bill/116th-congress/house-bill/1423.
[47] Andrew Keshner, "Congress could rewrite the rules on forced arbitration – 3 reasons every American should care," *Marketwatch* (Sept. 27, 2019), *available at* https://www.marketwatch.com/story/congress-could-rewrite-the-rules-on-forced-arbitration-here-are-3-ways-it-affects-consumers-and-workers-that-you-might-not-be-aware-of-2019-09-24.
[48] National Association of Attorneys General, Letter concerning Mandatory Arbitration of Sexual Harassment Disputes (Feb. 28, 2019), *available at* http://myfloridalegal.com/webfiles.nsf/WF/HFIS-AVWMYN/$file/NAAG+letter+to+Congress+Sexual+Harassment+Mandatory+Arbitration.pdf.

arbitration agreements from being valid or enforceable if they required arbitration of a sexual discrimination claim.[49]

As these various Congressional actions demonstrate, members of Congress clearly recognize the pressing significance and public outcry concerning the issues raised by the use of contractual provisions requiring employees to arbitrate their employment-related claims.

4. States have Passed Legislation Limiting or Barring Mandatory Arbitration

Not willing to wait for a federal solution to the pressing issues presented by the use of arbitration provisions in the employment context, numerous states have stepped into the public debate and enacted legislation limiting or banning mandatory arbitration of employment-related claims. Such actions further demonstrate that the issue has become sufficiently significant to transcend ordinary business operations.

On October 10, 2019, California Governor Gavin Newsom signed into law Assembly Bill 51, which prohibits employers within California from "requiring any applicant for employment or any employee to waive any right, forum, or procedure for a violation of any provision of the California Fair Employment and Housing Act or other specific statutes governing employment as a condition of employment, continued employment, or the receipt of any employment-related benefit." [50] The enactment of this law attracted significant national attention.[51]

California's recent actions follow upon similar measures taken in other states. In 2018, New York enacted legislation restricting the use of mandatory arbitration clauses in connection with claims of sexual harassment.[52] In March 2018, Washington enacted legislation voiding provisions in employment contracts that required employees to waive their right to publicly pursue a discrimination claim under state or federal law, as well as provisions that required an employee to resolve discrimination claims in a confidential dispute resolution process.[53]

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[49] H.R. 1443 – Ending Forced Arbitration of Sexual Harassment Act of 2019, available at https://www.congress.gov/bill/116th-congress/house-bill/1443.

[50] California Assembly Bill No. 51, *available at* http://www.leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201920200AB51.

[51] *See, e.g.*, Megan McCarty Carino, "California gives more workers the right to sue for workplace harassment, discrimination," *Marketplace*, Oct. 11, 2019, *available at* https://www.marketplace.org/2019/10/11/california-outlaws-forced-arbitration-win-workers-rights/; Alexia Fernandez Campbell, "California finally bans forced arbitration at work," *Vox*, Oct. 11, 2019, *available at* https://www.vox.com/identities/2019/10/11/20909589/california-forced-arbitration-bill-ab-51; and Michael S. Kun & Kevin Sullivan, "California Governor signs legislation outlawing mandatory arbitration agreements with employees," *The National Law Review*, Oct. 11, 2019, *available at* https://www.natlawreview.com/article/california-governor-signs-legislation-outlawing-mandatory-arbitration-agreements.

[52] Robert Heary & Michael Sciotti, "New York enacts sweeping sexual harassment legislation," *Buffalo Law Journal* (June 6, 2018), *available at* https://www.bizjournals.com/buffalo/news/2018/06/26/column-new-york-enacts-sweeping-sexual-harassment.html.

[53] Adam T. Pankratz & Kyle D. Nelson, "#MeToo Comes to Washington State" (Mar. 27, 2018), *available at* https://ogletree.com/insights/2018-03-27/metoo-comes-to-washington-state/.

Maryland, New Jersey and Vermont have also passed legislation targeted at the use of mandatory arbitration in the employment context.[54]

5. Mandatory Arbitration is a Topic of Widespread Debate in the News Media and among Legal Academics and Researchers

Finally, the use of contractual provisions requiring employees to arbitrate their employment-related claims has been the subject of a wealth of news coverage, as well as legal and academic research. The following is just a *small sample* of some of that recent coverage and research, and serves to further substantiate the conclusion that the subject matter of the Proposal has become a significant policy issue.

- Editorial/Opinion Articles:
  - Nan Aron & Celine McNicholas, "The Trump administration is decimating workers' rights," *CNN* (Aug. 27, 2019), *available at* https://www.cnn.com/2019/08/27/perspectives/forced-arbitration/index.html
  - Matthew Finkin, "Dealing with harassment? Discrimination? Wage theft? Good luck getting justice with mandatory arbitration," *Los Angeles Times* (Feb. 9, 2018), *available at* https://www.latimes.com/opinion/op-ed/la-oe-finkin-forced-arbitration-20180209-story.html
  - Sarah Staszak, "Google workers want to outlaw mandatory arbitration. Here's why this matters," *The Washing Post* (May 3, 2019), *available at* https://www.washingtonpost.com/politics/2019/05/03/google-workers-want-outlaw-mandatory-arbitration-heres-why-this-matters/
  - Rakeen Mabud, "New Mandatory Arbitration Legislation is a Great Step, but not a Cure-all," *Forbes* (Sept. 26, 2019), *available at* https://www.forbes.com/sites/rakeenmabud/2019/09/26/new-mandatory-arbitration-legislation-is-a-great-step-but-not-a-cure-all/#356cfdf33dc2
  - Mark Stern, "The Decade Class Actions were Gutted," *Slate* (Dec. 18, 2019), *available at* https://slate.com/news-and-politics/2019/12/decade-class-action-was-gutted.html
  - Helaine Olen, "The Supreme Court just made it easier on employers – and harder on workers," *The Washington Post* (May 21, 2018), *available at* https://www.washingtonpost.com/blogs/plum-line/wp/2018/05/21/the-supreme-court-just-made-it-easier-on-employers-and-harder-on-workers/
  - Alexia Fernandez Campbell & Alvin Chang, "There's a good chance you've waived the right to sue your boss," *Vox* (Sept. 7, 2018), *available at* https://www.vox.com/2018/8/1/16992362/sexual-harassment-mandatory-arbitration
  - InvestmentNews, "Time to end mandatory arbitration," *InvestmentNews* (Jan. 3, 2020), *available at* https://www.investmentnews.com/time-to-end-mandatory-arbitration-2-175854

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[54] *See* Gena B. Usenheimer, Anne R. Dana & Vlada Feldman, "#MeToo Inspires Legislative Changes Across the United States" (Mar. 28, 2019), *available at* https://www.seyfarth.com/news-insights/metoo-inspires-legislative-changes-across-the-united-states.html.

- Scott McCleskey, "Mandatory arbitration is bad policy and bad for business," *Reuters* (Nov. 27, 2017), *available at* https://www.reuters.com/article/bc-finreg-mandatory-arbitration/commentary-mandatory-arbitration-is-bad-policy-and-bad-for-business-idUSKBN1DS00P
- Debra S. Katz, "30 million women can't sue their employer over harassment. Hopefully that's changing," *The Washington Post* (May 17, 2018), *available at* https://www.washingtonpost.com/opinions/companies-are-finally-letting-women-take-sexual-harassment-to-court/2018/05/17/552ca876-594e-11e8-b656-a5f8c2a9295d_story.html

- General News Articles:
  - Andrew Keshner, "The number or workers suing their employers fell last year for the first time in 16 years – why you should be concerned," *MarketWatch* (Jan. 8, 2020), *available at* https://www.marketwatch.com/story/employees-arent-suing-their-workplaces-as-often-as-they-used-to-but-is-that-necessarily-a-good-thing-2020-01-07
  - Jena McGregor, "Google and Facebook ended forced arbitration for sexual harassment claims. Why more companies could follow," *The Washington Post* (Nov. 12, 2018), *available at* https://www.washingtonpost.com/business/2018/11/12/google-facebook-ended-forced-arbitration-sex-harassment-claims-why-more-companies-could-follow/
  - Alexia Fernandez Campbell, "Google employees walked out for the right to sue their bosses. Now they're taking the fight to Congress," *Vox* (Feb. 28, 2019), *available at* https://www.vox.com/policy-and-politics/2019/2/28/18244686/google-employees-forced-arbitration-bill-congress
  - Alexia Fernandez Campbell, "Democrats want to ban mandatory arbitration at work. Senate Republicans are listening," *Vox* (Apr. 3, 2019), *available at* https://www.vox.com/2019/4/3/18292168/forced-arbitration-senate-bill-hearing
  - Alexia Fernandez Campbell, "House Democrats have a sweeping plan to protect millions of workers' legal rights," *Vox* (Nov. 14, 2018), *available at* https://www.vox.com/policy-and-politics/2018/11/14/18087490/mandatory-arbitration-house-democrats
  - Alexia Fernandez Campbell, "Female law students pressure firms to stop banning sexual harassment suits," *Vox* (Dec. 3, 2018), *available at* https://www.vox.com/2018/12/3/18123798/womens-student-association-mandatory-arbitration
  - Alexia Fernandez Campbell, "The House just passed a bill that would give millions of workers the right to sue their boss," *Vox* (Sept. 20, 2019), *available at* https://www.vox.com/identities/2019/9/20/20872195/forced-mandatory-arbitration-bill-fair-act
  - Michael Hobbes, "It's shockingly easy for your boss to steal from you and get away with it," *HuffPost* (June 8, 2019), *available at*

https://www.huffpost.com/entry/wage-theft-employers-stealing_n_5cfa7c1ae4b045133e6057a1

- Sejal Singh & Andre Manuel, "Harvard Law Students Are Taking on Forced Arbitration," *The Nation* (Apr. 15, 2019), *available at* https://www.thenation.com/article/archive/harvard-law-students-are-taking-on-forced-arbitration/
- "McDonald's Raises the Level of Transparency on Forced Arbitration Policies for All Companies," *CSRwire* (Apr. 16, 2019), *available at* https://www.csrwire.com/press_releases/41884-McDonald-s-Raises-the-Level-of-Transparency-on-Forced-Arbitration-Policies-for-All-Companies
- Daisuke Wakabayashi, "Google Ends Forced Arbitration for All Employee Disputes," *New York Times* (Feb. 21, 2019), *available at* https://www.nytimes.com/2019/02/21/technology/google-forced-arbitration.html
- Alexia Fernandez Campbell, "Google employees fought for their right to sue the company – and won," *Vox* (Feb. 22, 2019), *available at* https://www.vox.com/technology/2019/2/22/18236172/mandatory-forced-arbitration-google-employees
- Stephanie Russell-Kraft, "DLA Piper hit by law student protests over arbitration," *Bloomberg Law* (Oct. 10, 2019), *available at* https://biglawbusiness.com/dla-piper-offices-hit-by-law-student-protests-over-arbitration
- Stephanie Russell-Kraft, "Kirkland & Ellis drops arbitration for non-attorney staff," *Bloomberg Law* (Dec. 7, 2018), *available at* https://biglawbusiness.com/kirkland-ellis-drops-arbitration-for-non-attorney-staff
- Stephanie Russell-Kraft, "LGBTQ students refuse funds from law firms with arbitration," *Bloomberg Law* (Nov. 6, 2019), *available at* https://news.bloomberglaw.com/us-law-week/lgbtq-students-refuse-funds-from-law-firms-with-arbitration
- Brianna Holt, "Why forced arbitration policies are a huge red flag for women at work," *Quartz* (Sept. 19, 2019), *available at* https://qz.com/1711352/what-is-forced-arbitration-and-why-should-women-be-wary-of-it/
- Dave Jamieson, "Chipotle's Mandatory Arbitration Agreements Are Backfiring Spectacularly," *HuffPost* (Dec. 21, 2018), *available at* https://www.huffpost.com/entry/chipotle-mandatory-arbitration-agreements_n_5c1bda0de4b0407e90787abd
- Greg Bensinger, "Uber Ends Mandatory Arbitration Clauses for Sexual-Harassment Claims," *The Wall Street Journal* (May 15, 2018), *available at* https://www.wsj.com/articles/uber-ends-mandatory-arbitration-clauses-for-sexual-harassment-claims-1526378400

- Legal and Academic Research
  - Alexander J.S. Colvin, "The Growing Use of Mandatory Arbitration," (Apr. 6, 2018), *available at* https://www.epi.org/files/pdf/144131.pdf.

- Katherine V.W. Stone & Alexander J.S. Colvin, "The Arbitration Epidemic," (Dec. 7, 2015), *available at* https://www.epi.org/files/2015/arbitration-epidemic.pdf.
- Economic Policy Institute, "Unchecked corporate power: Forced arbitration, the enforcement crisis, and how workers are fighting back" (May 2019), *available at* https://www.epi.org/files/uploads/Unchecked-Corporate-Power-web.pdf
- Cynthia Estlund, *The Black Hole of Mandatory Arbitration,* 96 N.C. L. Rev. 679 (2018), *available at* https://scholarship.law.unc.edu/nclr/vol96/iss3/3/
- Myriam Gilles, *The Day Doctrine Died: Private Arbitration and the End of Law*, 2016 U. Ill. L. Rev. 371 (2016), *available at* https://illinoislawreview.org/wp-content/uploads/2016/05/Gilles.pdf
- Jean R. Sternlinght, *Mandatory Arbitration Stymies Progress Towards Justice in Employment Law: Where To, #MeToo?*, 54 Harv. C.R.-C.L. L. Rev. 155 (2019), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3290361

D. The Use of Contractual Provisions Requiring Employees to Arbitrate Employment-Related Claims is a Significant Policy Issue for Dollar General

As noted above, the Staff "takes a company-specific approach in evaluating significance," and "a policy issue that is significant to one company may not be significant to another."[55] Here, basic publicly available information concerning Dollar General's specific use of contractual provisions requiring employees to arbitrate employment-related claims makes clear that the significant policy issues associated with the use of such provisions are also significant for the Company.

The No-Action Request states that the Company has more than 140,000 employees across 44 states.[56] It is quite likely that a large number of these 140,000 employees have agreed to submit nearly any employment-related claim they have to arbitration. Dollar General's Senior Director of Labor and Employment Law submitted sworn testimony that "*all employees* hired by Dollar General in and after August 2014 were presented with Dollar General's Employee Arbitration Agreement," with each employee having "the option of consenting to the agreement or opting out."[57] Although Dollar General maintains its employee arbitration agreement is "voluntary,"[58] employees that receive and fail to affirmatively opt-out of the agreement within 30 days are "bound by the Agreement."[59] The requirement that a Dollar General employee must affirmatively opt-out of the Company's arbitration agreement means that it is quite likely that many—if not most—of Dollar General's employees are subject to an arbitration agreement that, at best, they have limited knowledge of. Given these facts, the various debates swirling around the continued use of contractual arbitration provisions are significant for the Company.

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[55] SLB 14K at § B.2.
[56] No Action Request at 3.
[57] *Keyes v. Dollar General Corp.*, 240 So.3d 373, 375 (Miss. 2018).
[58] *Hubbard v. Dolgencorp, LLC*, 17-cv-1133, 2017 WL 4323588, *1 (W.D. Tenn. Sept. 28, 2017).
[59] *Arment v. Dolgencorp, LLC*, 18-cv-26, 2018 WL 5921369, *1 (E.D. Mo. Nov. 13, 2018).

E. The Company's Significance Analysis is Defective and Should be Disregarded

The Staff has advised that "evaluating whether a proposal transcends ordinary business matters" is a matter a company's board of directors "is well-situated to analyze," and that such an analysis "can assist the staff in evaluating a company's no-action request."[60] Accordingly, the Staff encourages companies to present a "well-developed discussion of the board's analysis of whether the particular policy issue raised by the proposal is sufficiently significant in relation to the company," and ensure that it describes "in sufficient detail the specific substantive factors the board considered in arriving at its conclusion."[61] Although the Staff does "not necessarily expect the board, or a board committee, to prepare the significance analysis that is included in the company's no-action request," it does advise that "it is important that the appropriate body with fiduciary duties to shareholders give due consideration as to whether the policy issue presented by a proposal is of significance to the company."[62]

Here, the No-Action Request states that while the Company's board was "notified" of the Proposal, it was actually the Compensation Committee—a committee composed of three of the Company's eight board members, and which, among other things, oversees general compensation matters, including the evaluation of shareholder proposals concerning executive compensation[63]—that "reviewed and considered" the Proposal and deliberated on it significance to the Company.[64] The Compensation Committee ultimately "concurred with management's view that … the Proposal does not raise a significant policy issue that transcends the Company's ordinary business."[65] The full board was then "notified of the Committee's determination … and concurred."[66]

There is nothing in the No-Action Request to indicate that the Company's full board—which is the "appropriate body with fiduciary duties to shareholders"—ever gave "due consideration" to whether the policy issue presented by the Proposal was of significance to the Company. To the contrary, consideration of the Proposal was delegated to the Compensation Committee, which then simply "notified" the full board of its "determination." There is no suggestion that, after receiving notice of the Compensation Committee's determination that the full board engaged in any sort of evaluation or discussion of the Compensation Committee's determination, much less the substantive analysis that led to the determination. All that the No-Action Request states is that the board "concurred" in the Compensation Committee's determination.

Furthermore, while the No-Action Request details the various substantive factors the Compensation Committee considered, absent from its description is a "well-developed discussion" of how these factors were weighed or how they individually or in combination with

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[60] SLB 14k at § B.3.
[61] *Id.*
[62] *Id.*
[63] *See* Dollar General Corporation Compensation Committee Charter, *available at* https://irpages2-preview.eqs.com/download/companies/dollargeneral/Committee%20Charters/Charter_Compensation_Committee.pdf.
[64] No Action Request at 8.
[65] *Id.* at 9.
[66] *Id.*

other factors warranted the Committee's final determination. Nor does it appear that the Compensation Committee considered the growing public and political debate about the widespread use of mandatory arbitration provisions and the relevance of that debate to the Company, given the Company's widespread use of arbitration.

Finally, it is not clear that the Compensation Committee was the committee best qualified to review the Proposal, as under its Charter it is tasked with dealing with executive and board compensation matters, which the Proposal does not concern. In contrast, Dollar General's Nominating and Governance Committee Charter tasks it with evaluating and making recommendations concerning shareholder proposals that relate to "social responsibility and sustainability."[67] Given the Proposal's connection to workers' rights, which falls under the broad rubric of social responsibility and sustainability, the board should have delegated the performance of the significance analysis to the Nominating and Governance Committee if it did not plan to conduct the analysis itself. Regardless of which board committee performed the analysis, the full board needed to give "due consideration" to that analysis for it to carry any weight. There is no indication that was done here.

For these reasons, the Company's significance analysis of the Proposal is defective and should not be accorded any weight.

Conclusion

For the reasons set forth above, Dollar General has not satisfied its burden of showing that it is entitled to omit the Proposal in reliance on Rule 14a-8(i)(7). The Systems thus respectfully request that Dollar General's No-Action Request be denied.

The Systems appreciate the opportunity to be of assistance in this matter. If you have any questions or need additional information, please contact me at (212) 669-2065.

Respectfully submitted,

Kathryn E. Diaz

cc: Christine L. Connolly
Corporate Secretary, Dollar General Corporation
sjulia@dollargeneral.com

[67] Dollar General Corporation Nominating and Governance Committee Charter, *available at* https://irpages2-preview.eqs.com/download/companies/dollargeneral/Committee%20Charters/Charter_Nominating_and_Governance_Committee.pdf.

DOLLAR GENERAL

Dollar General Corporation
100 Mission Ridge
Goodlettsville, TN 37072
U.S.A.

January 9, 2020

Via E-Mail (shareholderproposals@sec.gov)

Office of Chief Counsel
Division of Corporation Finance
U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549

Re: Dollar General Corporation
Exclusion of Shareholder Proposal from the Office of the Comptroller of the City of New York

Ladies & Gentlemen:

In accordance with Rule 14a-8(j) of the Securities Exchange Act of 1934, as amended (the "Exchange Act"), Dollar General Corporation (the "Company") is writing to inform you of the Company's intention to exclude from its proxy statement and form of proxy (collectively, the "2020 Proxy Materials") for its 2020 Annual Meeting of Shareholders the enclosed shareholder proposal (the "Proposal") and statement in support thereof (the "Supporting Statement") submitted by the Office of the Comptroller of the City of New York (the "Proponent"), in its capacity as custodian and trustee of the New York City Employees' Retirement System, The New York City Teachers' Retirement System and the New York City Police Pension Fund, and custodian of the New York City Board of Education Retirement System.

The Company respectfully requests that the staff of the Division of Corporate Finance (the "Staff") of the U.S. Securities and Exchange Commission (the "Commission") confirm that it will not recommend any enforcement action to the Commission if the Company excludes the Proposal from its 2020 Proxy Materials in reliance upon Rule 14a-8(i)(7) of the Exchange Act because the Proposal deals with matters related to the Company's ordinary business operations within the meaning of Rule 14a-8(i)(7).

Pursuant to Rule 14a-8(j) of the Exchange Act and Staff Legal Bulletin No. 14D (November 7, 2008) ("SLB 14D"), the Company has:

- Electronically submitted this letter, the Proposal, the Supporting Statement and related correspondence (collectively attached as **Exhibit A**) to the Commission no later than eighty calendar days before the Company intends to file its definitive 2020 Proxy Materials with the Commission; and

- concurrently sent a copy of such documents to the Proponent.

THE PROPOSAL

The Company received the Proposal on November 16, 2019, accompanied by a cover letter from the Proponent dated November 13, 2019 and postmarked November 15, 2019. On November 27, 2019, the Company sent to the Proponent, via overnight delivery: (1) a letter requesting the requisite proof of ownership of shares of Company common stock as of the date of submission of the Proposal as required by Rule 14a-8 of the Exchange Act; and (2) copies of Rule 14a-8, Staff Legal Bulletin Nos.14F and 14G (collectively, the "Deficiency Letter"). On December 5, 2019, the Company received letters from State Street Bank and Trust Company (collectively, the "Broker Letters") verifying the Proponent's stock ownership. Copies of the Deficiency Letter and the Broker Letters are included as part of **Exhibit A**.

The Proposal states:

> RESOLVED that shareholders of Dollar General Corporation ("Dollar General") urge the Board of Directors to report to shareholders, at reasonable cost and omitting confidential and proprietary information, on the use of contractual provisions requiring employees of Dollar General to arbitrate employment-related claims. The report should specify the proportion of the workforce subject to such provisions; the number of employment-related arbitration claims initiated and decided in favor of the employee, in each case in the previous calendar year; and any changes in policy or practice Dollar General has made, or intends to make, as a result of California's ban on agreeing to arbitration as a condition of employment.

BASIS FOR EXCLUSION

We respectfully request that the Staff concur in our view that the Proposal may be excluded from the 2020 Proxy Materials pursuant to Rule 14a-8(i)(7) because the Proposal deals with matters related to the Company's ordinary business operations within the meaning of Rule 14a-8(i)(7).

ANALYSIS

The Proposal may be excluded pursuant to Rule 14a-8(i)(7) because it deals with matters related to the Company's ordinary business operations.

1. *Background of Rule 14a-8(i)(7).*

Rule 14a-8(i)(7) permits a company to omit from its proxy materials a shareholder proposal relating to the company's "ordinary business" operations. "Ordinary business" does not mean "ordinary" in the common meaning of the word. Rather, the term "is rooted in the corporate law concept providing management with flexibility in directing certain core matters involving the company's business and operations." Exchange Act Release No. 40018, § II (May 21, 1998) (the "1998 Release"). *See also* Staff Legal Bulletin 14K, § B (October 16, 2019) ("SLB 14K").

The purpose of Rule 14a-8(i)(7) is "to confine the resolution of ordinary business problems to management and the board of directors, since it is impracticable for shareholders to decide how to solve such problems at an annual shareholders meeting." 1998 Release at § III. Two key considerations underlie this policy. The first consideration is that "certain tasks are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight." *Id.* The second relates to the "degree to which the proposal seeks to 'micro-manage' the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment." *Id.* (citing Exchange Act Release No. 12999 (November 22, 1976) (the "1976 Release")).

In accordance with the 1998 Release and SLB 14K, certain proposals pertaining to ordinary business matters would not be excludable if they are focused on "significant social policy issues." *Id.* and SLB 14K. The Staff has stated that "[i]n those cases in which a proposal's underlying subject matter transcends the day-to-day business matters of the company and raises policy issues so significant that it would be appropriate for a shareholder vote, the proposal generally will not be excludable under Rule 14a-8(i)(7) as long as a sufficient nexus exists between the nature of the proposal and the company." Staff Legal Bulletin 14E, Note 4 (October 27, 2009). The Staff subsequently affirmed this position by explaining that "[w]hether the significant policy exception applies depends, in part, on the connection between the significant policy issue and the company's business operations." Staff Legal Bulletin 14H, Note 32 (October 22, 2015). Most recently, the Staff clarified that it "takes a company-specific approach in evaluating significance, rather than recognizing particular issues or categories of issues as universally 'significant.'" SLB 14K § B2. In this regard, when assessing proposals under Rule 14a-8(i)(7), the Staff considers the terms of the resolution and its supporting statement as a whole. *See* Staff Legal Bulletin No. 14C, part D.2 (June 28, 2005) ("In determining whether the focus of these proposals is a significant social policy issue, we consider both the proposal and the supporting statement as a whole.").

That a shareholder proposal is framed in the form of a request for a report does not change the nature of the proposal. The Commission has long held that a proposal requesting the dissemination of a report may be excludable under Rule 14a-8(i)(7) if the subject matter of the report is within the ordinary business of the issuer. *See* Exchange Act Release No. 20091 (August 16, 1983). The Staff has indicated that "[where] the subject matter of the additional disclosure sought in a particular proposal involves a matter of ordinary business ...it may be excluded under [R]ule 14a-8(i)(7)." *Johnson Controls, Inc.* (October 26, 1999). As a result, when evaluating whether a proposal may be excluded under Rule 14a-8(i)(7), the primary focus is on the subject matter of the proposal rather than the action requested by the proponent.

2. *The Proposal Is Excludable Because It Relates To The Company's Management Of Its Workforce.*

The Company has more than 140,000 employees located in more than 16,000 stores in 44 states across the country. The Proposal, which requests a report on the use of contractual provisions requiring arbitration of employment-related claims, focuses on the Company's management of its workforce by eliciting information regarding the Company's practices and outcomes related to the way the Company contracts with and handles disputes with and among its extensive workforce. The Company's decisions with respect to management of its workforce, including whether and under what circumstances to enter into contractual arrangements with employees, are fundamental to the management of the Company's business. Such provisions have long been utilized by many businesses – including the Company – to manage the costs and risks associated with employing an extensive workforce.

In the 1998 Release, the Commission recognized that certain tasks "are so fundamental to management's ability to run a company on a day-to-day basis that they could not, as a practical matter, be subject to direct shareholder oversight." Examples of such tasks include "management of the workforce, such as the hiring, promotion, and termination of employees, decisions on production quality and quantity, and the retention of suppliers." *Id.* Likewise, the Staff has consistently recognized that proposals pertaining to the management of a company's workforce, including a company's employment practices, are excludable under Rule 14a-8(i)(7). The Staff concurred with exclusion of a proposal in *Berkshire Hathaway Inc.* (January 31, 2012) that mandated the dismissal of employees who, among other things, engaged in behavior that would create a conflict of interest. Similarly, in *Bank of America Corp.* (February 14, 2012), the Staff concurred with exclusion of a proposal requesting that a company policy be amended to include "protection to engage in free speech outside the job context, and to participate freely in the political process without fear of discrimination or other repercussions on the job" because the proposal related to the company's policies concerning its employees. *See also Merck & Co., Inc.* (March 6, 2015) (concurring with exclusion of a proposal requesting that the company fill only entry-level positions with outside candidates and adopt a policy of developing individuals for its higher level positions exclusively from employees meeting certain standards because "the proposal relates to procedures for hiring and promoting employees"); *Starwood Hotels & Resorts Worldwide, Inc.* (February 14, 2012) (concurring with exclusion of a proposal requesting verification and documentation of U.S. citizenship for the company's U.S. workforce because it concerned "procedures for hiring and training employees"); *Northrop Grumman Corp.* (March 18, 2010) (concurring with exclusion of a proposal requesting that the board provide certain disclosures in the context of the company's reduction-in-force review process, noting that "[p]roposals concerning a company's management of its workforce are generally excludable under [R]ule 14a-8(i)(7)"); *Merck & Co., Inc.* (March 6, 2002) (concurring with exclusion of a proposal requesting that the company keep shareholders informed regarding resolution of employment disputes because it related to the company's "management of the workforce"); *Burlington Northern Santa Fe Corp.* (February 15, 2000) (concurring with exclusion of a proposal relating to employment policies because it related to "management of the workforce").

The Supporting Statement describes the Proposal as focused on a variety of recently high-profile employment-related issues (none of which specifically related to the Company), and concludes by stating that "the information sought in the Proposal would allow shareholders to assess the proportion of the workforce subject to mandatory arbitration of employment-related claims together with the risks posed by the use of such provisions." In doing so, the Supporting Statement shows that the intent and scope of the Proposal directly relates to the management of the Company's workforce and not a particular significant policy issue. The Proposal seeks statistical information on the prevalence and use of arbitration agreements by the Company, as well as information regarding changes the Company has implemented or plans to implement as a result of recent legislation passed in the State of California. Even if the Company provided the information requested, shareholders (including the Proponent) would not be equipped to effectively manage Company policy on this subject matter. Such decisions require consideration of a range of additional factors, including applicable laws and regulations in the many jurisdictions where employees work, the costs to the Company and employees of relying on arbitration relative to other alternatives such as the court system, the ability of employees to opt out of arbitration provisions, the effect of arbitration provisions on the length of time required to adjudicate or settle claims, the potential reduction of uncertainties involved in jury trials, and other potential benefits and drawbacks to both the Company and its employees. This information is beyond the knowledge and expertise of most shareholders and would not be practicable to communicate to the extent necessary for shareholders to make informed decisions regarding the Company's management of its workforce of over 140,000 employees in 16,000 stores across 44 states.

Dollar General is committed to fair employment practices and has policies in place that are designed to protect all of its employees from discrimination, wage and hour violations, and harassment (regardless of whether those employees are senior executives, other management, or front-line retail store associates). Despite recent legislative developments in a few jurisdictions related to mandatory arbitration of employment-related claims, the contractual arrangements highlighted in the Proposal are legal and longstanding practices that are routinely utilized by many companies across the country. The Company's decisions with respect to the management of its workforce, including whether and under what circumstances to enter into or enforce contractual provisions requiring arbitration of employment-related claims and disputes with and among employees and the handling of such claims and disputes, are fundamental to the management of the Company's business. As described above, these decisions are multifaceted, complex, and based on factors beyond the knowledge and expertise of shareholders, and as a practical matter should not be subject to direct shareholder oversight. For these reasons, similar to the proposals discussed above, the Proposal directly implicates ordinary business matters and is therefore excludable under Rule 14a-8(i)(7).

3. *The Proposal Does Not Focus On A Significant Policy Issue That Transcends the Company's Ordinary Business Operations.*

In the context of evaluating exclusions under Rule 14a-8(i)(7), the 1998 Release states that proposals "focusing on sufficiently significant social policy issues (e.g., significant discrimination matters) generally would not be considered to be excludable." In SLB 14K, the Staff reiterated this position, clarifying that it takes a "company-specific approach to evaluating significance, rather than recognizing particular issues or categories of issues as universally 'significant'." In prior no-action determinations, the Staff affirmed that a proposal that references significant policy issues may nonetheless be excluded. For example, the proposal in *Johnson & Johnson* (February 23, 2017) requested a report "detailing the known and potential risks and costs to the company caused by pressure campaigns to oppose religious freedom laws (or efforts), public accommodation laws (or efforts), freedom of conscience laws (or efforts) and campaigns against candidates from Title IX exempt institutions." The Staff agreed that the proposal could be excluded under Rule 14a-8(i)(7) as related to the company's management of its workforce regardless of the fact that such arguably facially relevant social and political issues as discrimination, freedom of religion, and other human rights were raised by the proponent in support of the proposal.

The Staff came to a similar conclusion in *Deere & Co.* (November 14, 2014, *recon. denied* Jan. 5, 2015), where, despite the fact that the proposal's request to adopt a company-wide employee code of conduct facially implicated several significant policy issues related to the company's employees (e.g., anti-discrimination, human rights, political process, and civic activities), the Staff permitted exclusion of the proposal because it related to the company's "policies concerning its employees" and therefore implicated the company's ordinary business operations. *See also, The Home Depot, Inc.* (February 13, 2018) (concurring with exclusion of a proposal relating to the company's contributions to particular organizations, even though the proponent presented the proposal as relating to human rights policies) and *Dominion Resources, Inc.* (February 19, 2014) (concurring with exclusion of a proposal relating to the use of alternative energy because, while touching on a significant policy issue, the proposal related to the company's choice of technologies for use in its operations). Additional no-action precedent supports that the Staff consistently grants relief in a variety of contexts where the proposal focuses on ordinary business matters while also raising potential significant policy issues. *See Bristol-Myers Squibb Co.* (January 7, 2015) (concurrence with exclusion of a proposal requesting adoption of "anti-discrimination principles that protect employees' human right to engage . . . in legal activities relating to the political process, civic activities and public policy"); *Yum! Brands, Inc.* (January 7, 2015, *recon. denied* February 26, 2015) (same); *Comcast Corp.* (March 10, 2015) (concurring with exclusion of a proposal relating to the company's policies concerning employees despite references to human rights); *Hewlett-Packard Co.* (January 23, 2015) (concurring with exclusion of a proposal requesting the company prepare a report on sales of products and services to the military, police and intelligence agencies of foreign countries).

Other past determinations by the Staff illustrate that, in accordance with the Staff's guidance set forth in SLB 14K, even where a proposal that relates to a company's ordinary business operations directly addresses a potential significant policy issue, it may be excluded if the policy issue does not "transcend the Company's ordinary business operations." SLB 14K, § B2. For example, in *Walmart Inc.* (April 8, 2019), the Staff concurred in exclusion of a proposal under Rule 14a-8(i)(7) that sought a report on the risk of discrimination that may result from hourly workers utilizing personal and sick time, noting that the proposal related to Walmart's management of its workforce and did not focus on an issue that transcends ordinary business matters. See also *Bank of America Corp.* (February 19, 2014, *recon. denied* March 10, 2014, *Comm. review denied* May 22, 2014) (concurring in exclusion of a proposal under Rule 14a-8(i)(7) that addressed compensation arrangements raising a significant policy issue because the proposal also encompassed non-incentive based compensation arrangements that implicated the company's ordinary business operations); *Apache Corp.* (March 5, 2008) (concurring in exclusion of a proposal requesting implementation of equal employment opportunity policies based on certain principles and noting that "some of the principles relate to Apache's ordinary business operations"); *General Electric Co.* (February 10, 2000) (concurring in exclusion of a proposal relating to accounting and use of funds for the company's executive compensation program that both raised a significant policy issue related to senior executive compensation and involved an ordinary business matter of choice of accounting method); *Mattel, Inc.* (February 10, 2012) (concurring in exclusion of a proposal that requested the company require its suppliers to publish a report detailing their compliance with International Council of Toy Industries Code of Business Practices, noting that such code encompassed "several topics that relate to...ordinary business operations and are not significant policy issues").

Recently, in *CBRE Group, Inc.* (March 6, 2019), the Staff did not concur with the exclusion of a proposal requesting that CBRE prepare a report on the impact of mandatory arbitration policies that evaluates the risks that may result from such policies on claims of sexual harassment. In its determination letter, the Staff noted that the proposal transcended ordinary business matters. Although the *CBRE Group* proposal at first may appear facially similar to the Proposal, there are critical distinctions. First, the proposal in *CBRE Group* was narrowly focused on the company's mandatory arbitration policies as they pertained to the discrete issue of sexual harassment and abuse in the workplace. It was not, like the Proposal here, a broad proposal implicating every context under which an employment-related claim, or dispute among employees, is subjected to an arbitration arrangement.

Further, the proponent in *CBRE Group* expressly connected the subject matter of the proposal (i.e., sexual harassment in the workplace) as an unlawful form of employment discrimination based on sex – a federally-protected class. *Id.* (see response of AFL-CIO, dated February 4, 2019). By contrast, the Proposal fails to focus on any significant policy issue at all, and the Supporting Statement raises wide-ranging issues such as "wage theft," discrimination, "toxic cultures," employee morale and the effects of confidentiality provisions, in addition to sexual harassment, all in support of obtaining a report that the Proponent asserts "would allow shareholders to assess the proportion of the workforce subject to mandatory arbitration...together with the risks posed by the use of such provisions." As described in the Supporting Statement, the Proposal's core focus is related to the management of the Company's entire workforce regardless of context or category of claim – a matter of ordinary business. That the Proponent has attempted to tie recent high-profile social issues to the Proposal, including one that the Staff has found to be significant for a different company, is not a basis to disqualify the Proposal from exclusion under Rule 14a-8(i)(7).

Instead, the Proposal is analogous to *Amazon.com, Inc.* (March 6, 2019), where the Staff concurred with the exclusion of a proposal requesting that the company adopt a policy not to implement mandatory arbitration and other common contractual arrangements with its employees on the basis that the proposal "relate[d] generally to the Company's policies concerning employees, and does not focus on an issue that transcends ordinary business matters." *Id.* Like the Supporting Statement, the supporting statement submitted by the proponent in *Amazon.com, Inc.* referenced a variety of policy issues including sexual harassment, wage theft and discrimination. *See also Yum! Brands, Inc.* (March 6, 2019) (same).

The Proposal does not focus on a policy issue of significance to the Company as contemplated by the 1998 Release and SLB 14K. Rather, it relates to ordinary business matters that extend beyond any of the potentially broadly significant policy issues touched upon by the Supporting Statement. While the use of contractual provisions requiring arbitration in certain contexts has been a recent topic in the news media, there remain many complex and multi-faceted factors relevant to company-specific and workforce-specific determinations with respect to the use of contractual provisions requiring arbitration of employment-related claims generally, which are ordinary business matters. Because the Proposal focuses on ordinary business matters concerning the management of the Company's entire workforce and touches on a broad range of potential policy issues rather than focusing on a policy issue of significance to the Company, it may be properly excluded under Rule 14a-8(i)(7).

4. *The Perspective of the Company's Compensation Committee.*

In SLB 14K, the Staff reiterated its position that, when evaluating whether a proposal transcends ordinary business matters, difficult judgment calls may need to be made by the board of directors, who are well-situated to analyze issues raised by shareholder proposals. To that end, a well-developed description of the board of directors' analysis raised by the issues in the proposal – and whether a sufficient nexus exists between the subject matter of the proposal and the company's business – will help determine the significance of such issues to the company.

After the Company's Board of Directors was notified of the Proposal, the Company's Compensation Committee (the "Committee") reviewed and considered it further. The Company's management provided the Committee with the Proposal, the Supporting Statement, and related Company workforce management information, including information regarding the Company's experience with relying on arbitration rather than litigation to resolve employment-related claims. As part of its deliberations, the Committee reviewed the Proposal in the context of the Company's workforce management as well as the Company's existing policies and procedures in relation to the subject matter of the Proposal. In particular, the members of the Committee were provided information regarding management's rationale for relying on arbitration as a mechanism to resolve claims. The Committee took into consideration the following factors:

- the fact that arbitration provisions are widely-used among companies with large workforces and have recently been upheld by the United States Supreme Court;[1]

- the fact that the Company's arbitration agreement is optional, as new employees who are asked to sign an arbitration agreement are given a 30-day period during which they may seek counsel and, if desired, decline being subject to arbitration;

- the size and location of the Company's workforce and the fact that the Company's arbitration agreements do not target a specific type of employment-related claim, but rather apply to all employment-related claims except where otherwise prohibited by law;

- the fact that arbitration provisions can benefit both the Company and its employees by reducing overall litigation expenses and related uncertainty while at the same time ensuring that employees individually retain an opportunity for timely and fair consideration of their claims;

- in light of recent legislative changes in California and certain other states, the effect of changing laws and the Company's potential responses thereto, including the fact that the Company's management and legal counsel are currently evaluating how the Company will address those changes both in the affected jurisdictions and, potentially, Company-wide; and

[1] *See Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (holding that courts must enforce arbitration agreements according to their terms – including terms that provide for individualized proceedings for employment disputes).

- the policy issues touched on by the Supporting Statement – including sexual harassment, wage and hour violations, and discrimination – and whether any specific nexus exists between each such issue and the Company's use generally of contractual provisions requiring arbitration of employment-related claims in managing its workforce.

Finally, the Committee considered the interests of the Company's shareholders in connection with the issues raised by the Supporting Statement. The Company maintains an active engagement program with its institutional shareholders, including annual conversations with a number of its largest shareholders. No shareholder other than the Proponent has raised the Company's use of mandatory arbitration provisions as an issue with respect to the Company.

Based on the foregoing analysis, the Committee concurred with management's view that, after taking into account all of the relevant information with respect to the workforce management practices referenced in the Proposal, and weighing the policy concerns raised by the Supporting Statement against the Company's existing policies, the Proposal does not raise a significant policy issue that transcends the Company's ordinary business. The Board of Directors was subsequently notified of the Committee's determination in this regard and concurred.

CONCLUSION

Based upon the foregoing analysis, the Company respectfully requests that the Staff concur that it will take no action if the Company excludes the Proposal from its 2020 Proxy Materials.

The Company would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Please contact me with any questions with respect to this request, or if for any reason the Staff does not agree that the Company may exclude the Proposal from its 2020 Proxy Materials. In addition, should the Proponent choose to submit any response or other correspondence to the Commission, we request that the Proponent concurrently submit that response or other correspondence to the Company, as required pursuant to Rule 14a-8(k) and SLB 14D. Correspondence from the Staff or the Proponent may be directed to me in care of Selene Julia (sjulia@dollargeneral.com; 615-855-5177).

Respectfully,

Christine L. Connolly
Corporate Secretary

Enclosures

cc: Michael Garland, Assistant Comptroller, City of New York (*via e-mail*)
Rhonda Taylor, Esq., Dollar General Corporation (*via e-mail*)
Gregory F. Parisi, Esq., Troutman Sanders LLP (*via e-mail*)

Exhibit A
Shareholder Proposal and Related Correspondence

CITY OF NEW YORK
OFFICE OF THE COMPTROLLER
SCOTT M. STRINGER

Michael Garland
ASSISTANT COMPTROLLER
CORPORATE GOVERNANCE AND
RESPONSIBLE INVESTMENT

MUNICIPAL BUILDING
ONE CENTRE STREET, 8TH FLOOR NORTH
NEW YORK, N.Y. 10007-2341
TEL: (212) 669-2517
FAX: (212) 669-4072
MGARLAN@COMPTROLLER.NYC.GOV

November 13, 2019

Received
NOV 18 REC'D
GC / CPO

Christine L. Connolly
Corporate Secretary
Dollar General Corporation
100 Mission Ridge
Goodlettsville, TN 37072

Dear Ms. Connolly:

I write to you on behalf of the Comptroller of the City of New York, Scott M. Stringer. The Comptroller is the custodian and a trustee of the New York City Employees' Retirement System, the New York City Teachers' Retirement System, the New York City Police Pension Fund and the New York City Fire Pension Fund (the "Systems"). The Systems' boards of trustees have authorized the Comptroller to file this resolution and to inform you of their intention to present the enclosed proposal for the consideration and vote of stockholders at the Company's next annual meeting.

Therefore, we offer the enclosed proposal for the consideration and vote of shareholders at the Company's next annual meeting. It is submitted to you in accordance with Rule 14a-8 of the Securities Exchange Act of 1934, and I ask that it be included in the Company's proxy statement.

Letters from State Street Bank and Trust Company certifying the Systems' ownership, for over a year, of shares of Dollar General Corporation common stock are enclosed. Each System intends to continue to hold at least $2,000 worth of these securities through the date of the Company's next annual meeting.

We would welcome the opportunity to discuss the proposal with you. Should the Board of Directors decide to endorse its provision as corporate policy, we will withdraw the proposal from consideration at the annual meeting.

Please feel free to contact me at (212) 669-2517 if you would like to discuss this matter.

Sincerely,

Michael Garland
Enclosures

RESOLVED that shareholders of Dollar General Corporation. ("Dollar General") urge the Board of Directors to report to shareholders, at reasonable cost and omitting confidential and proprietary information, on the use of contractual provisions requiring employees of Dollar General to arbitrate employment-related claims. The report should specify the proportion of the workforce subject to such provisions; the number of employment-related arbitration claims initiated and decided in favor of the employee, in each case in the previous calendar year; and any changes in policy or practice Dollar General has made, or intends to make, as a result of California's ban on agreeing to arbitration as a condition of employment.

SUPPORTING STATEMENT

In recent years, public attention has focused on the use by companies of agreements requiring employees to pursue employment-related claims, including sexual harassment claims, through arbitration. High-profile sexual harassment cases involving Fox News, Google and Uber highlighted the impact of these agreements. A robust public debate has ensued, including responses by legislators, regulators and state attorneys general.

Mandatory arbitration precludes employees from suing in court for wrongs like wage theft, discrimination and harassment, and requires them to submit to private arbitration, which has been found to favor companies and discourage claims.

Sexual harassment is an urgent concern across industries. Wage theft from low-wage employees is widespread; a study estimated that wage theft costs low-wage workers in three large U.S. cities $3 billion per year.

In September 2018, the U.S. Equal Employment Opportunity Commission (EEOC) sued Dollar General for sexual harassment (see https://www.eeoc.gov/eeoc/newsroom/release/9-25-18c.cfm)

A bill to end mandatory arbitration of sexual harassment claims bill passed in the U.S. House of Representatives in September 2019, and 56 state and territorial attorneys general voiced support for it. A 2019 article characterized the "movement to end forced arbitration" as having "swept Silicon Valley," with employee walk-outs and company policy changes.[1] California recently banned the practice of requiring arbitration agreements as a condition of employment and Washington State enacted a law in 2018 invalidating contracts requiring arbitration of sexual harassment or assault claims.

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[1] https://www.sfchronicle.com/business/article/California-has-a-new-law-against-mandatory-14511832.php

Finally, because arbitration is private and contractual, arbitrating employment-related claims can allow a toxic culture to flourish, increasing the severity of eventual consequences and harming employee morale. Confidentiality provisions can prevent an employee's lawyer from using knowledge of wrongdoing to identify other victims.

The information sought in this Proposal would allow shareholders to assess the proportion of the workforce subject to mandatory arbitration of employment-related claims together with the risks posed by the use of such provisions

We urge shareholders to vote for this Proposal.

STATE STREET.

Derek A. Farrell
Asst. Vice President, Client Services

State Street Bank and Trust Company
c/o NYC Office of the Comptroller
Municipal Building
One Centre Street
New York, NY 10007
Telephone: 347 749-2420
dfarrell@statestreet.com

November 13, 2019

Re: New York City Police Pension Fund

To whom it may concern,

Please be advised that State Street Bank and Trust Company, under DTC number 997, held in custody continuously, on behalf of the New York City Police Pension Fund, the below position from October 31, 2018 through today as noted below:

Security:	DOLLAR GENERAL CORP
Cusip:	256677105
Shares:	93,077

Please don't hesitate to contact me if you have any questions.

Sincerely,

Derek A. Farrell
Assistant Vice President

STATE STREET.

Derek A. Farrell
Asst. Vice President, Client Services

State Street Bank and Trust Company
c/o NYC Office of the Comptroller
Municipal Building
One Centre Street
New York, NY 10007
Telephone: 347 749-2420
dfarrell@statestreet.com

November 13, 2019

Re: New York City Teachers' Retirement System

To whom it may concern,

Please be advised that State Street Bank and Trust Company, under DTC number 997, held in custody continuously, on behalf of the New York City Teachers' Retirement System, the below position from October 31, 2018 through today as noted below:

Security:	DOLLAR GENERAL CORP
Cusip:	256677105
Shares:	186,700

Please don't hesitate to contact me if you have any questions.

Sincerely,

Derek A. Farrell

Derek A. Farrell
Assistant Vice President

STATE STREET.

Derek A. Farrell
Asst. Vice President, Client Services

State Street Bank and Trust Company
c/o NYC Office of the Comptroller
Municipal Building
One Centre Street
New York, NY 10007
Telephone: 347 749-2420
dfarrell@statestreet.com

November 13, 2019

Re: New York City Fire Pension Fund

To whom it may concern,

Please be advised that State Street Bank and Trust Company, under DTC number 997, held in custody continuously, on behalf of the New York City Fire Pension Fund, the below position from October 31, 2018 through today as noted below:

Security: DOLLAR GENERAL CORP

Cusip: 256677105

Shares: 5,551

Please don't hesitate to contact me if you have any questions.

Sincerely,

Derek A. Farrell

Derek A. Farrell
Assistant Vice President

STATE STREET.

Derek A. Farrell
Asst. Vice President, Client Services

State Street Bank and Trust Company
c/o NYC Office of the Comptroller
Municipal Building
One Centre Street
New York, NY 10007
Telephone: 347 749-2420
dfarrell@statestreet.com

November 13, 2019

Re: New York City Employee's Retirement System

To whom it may concern,

Please be advised that State Street Bank and Trust Company, under DTC number 997, held in custody continuously, on behalf of the New York City Employee's Retirement System, the below position from October 31, 2018 through today as noted below:

Security: DOLLAR GENERAL CORP

Cusip: 256677105

Shares: 175,341

Please don't hesitate to contact me if you have any questions.

Sincerely,

Derek A. Farrell
Assistant Vice President

DOLLAR GENERAL

Dollar General Corporation
100 Mission Ridge
Goodlettsville, TN 37072
U.S.A.

November 27, 2019

Via Overnight Delivery

Mr. Michael Garland
City of New York
Office of the Comptroller
Municipal Building
One Centre Street, 8th Floor North
New York, NY 10007-2341

RE: Shareholder Proposal Submitted to Dollar General Corporation

Dear Mr. Garland:

On November 16, 2019, Dollar General Corporation (the "Company") received by mail a letter from you that was dated November 13, 2019 and postmarked November 15, 2019. Included with your letter was a proposal (the "Proposal") submitted by the Comptroller of the City of New York on behalf of certain systems and funds named therein for which the Comptroller is the custodian and trustee (the "Systems") and intended for inclusion in the Company's proxy statement for its 2020 Annual Meeting of Shareholders, along with letters from the record holder of the Systems' shares verifying the Systems continuous ownership of the specified shares from the period October 31, 2018 through November 13, 2019.

As you may be aware, Rule 14a-8 under the Securities Exchange Act of 1934 sets forth certain eligibility and procedural requirements that must be met in order to properly submit a shareholder proposal to the Company. Specifically, the shareholder must submit sufficient proof that it has continuously held at least $2,000 in market value, or 1%, of the Company's shares entitled to vote on the proposal for at least one year preceding and including the date the proposal was submitted. If the eligibility requirements under Rule 14a-8 are not met, the company to which the proposal has been submitted may, pursuant to Rule 14a-8(f), exclude the proposal from its proxy statement. A copy of Rule 14a-8 is enclosed for your reference.

This letter is to notify you that the Company has not received the requisite proof of ownership outlined above. The written statements from the record holder that were submitted with the Proposal were dated as of November 13, 2019 and verified the Systems' ownership of shares through such date, rather than through the date of submission of the Proposal (November 15, 2019). In addition, the Company's stock records do not indicate that the Systems have been a registered holder of the requisite amount of Company securities for at least one year. Under Rule 14a-8(b), you must therefore prove the Systems' eligibility to submit the Proposal by submitting to the Company either:

(1) revised written statements from the "record" holder of the Systems' shares verifying that the Systems have continuously held the requisite number of shares of the Company entitled to be voted on the Proposal for at least the one-year period prior to and including November 15, 2019, which is the date the Proposal was submitted; or

(2) a copy of a Schedule 13D, Schedule 13G, Form 3, Form 4 or Form 5, or amendments to those documents or updated forms, filed by the Systems with the Securities and Exchange Commission (the "SEC") reflecting the Systems' ownership of the requisite number of shares as of or before the date on which the one-year eligibility period begins, along with a written statement from the Systems that they have continuously held such shares for the one-year period as of the date of the statement.

Copies of SLB 14F and SLB 14G are also enclosed.

Please note that if you intend to submit such evidence of ownership, your response must be postmarked, or transmitted electronically, no later than 14 calendar days from the date you receive this letter. Your documentation and/or response may be sent to my attention at Dollar General Corporation, 100 Mission Ridge, Goodlettsville, TN 37072. Pursuant to Rule 14a-8(f) under the Exchange Act, the Company will be entitled to exclude the Proposal from its proxy materials if the proof of ownership outlined above is not timely received, or if such proof of ownership letter does not provide the proof of ownership information required by Rule 14a-8(b).

Please note that in addition to the eligibility deficiency cited above, the Company reserves the right in the future to raise any further bases upon which your Proposal may be properly excluded under Rule 14a-8 of the Exchange Act.

Sincerely,

Christine L. Connolly

Christine L. Connolly
Corporate Secretary

Enclosures

the Commission and furnished to the registrant, confirming such holder's beneficial ownership; and

(2) Provide the registrant with an affidavit, declaration, affirmation or other similar document provided for under applicable state law identifying the proposal or other corporate action that will be the subject of the security holder's solicitation or communication and attesting that:

(i) The security holder will not use the list information for any purpose other than to solicit security holders with respect to the same meeting or action by consent or authorization for which the registrant is soliciting or intends to solicit or to communicate with security holders with respect to a solicitation commenced by the registrant; and

(ii) The security holder will not disclose such information to any person other than a beneficial owner for whom the request was made and an employee or agent to the extent necessary to effectuate the communication or solicitation.

(d) The security holder shall not use the information furnished by the registrant pursuant to paragraph (a)(2)(ii) of this section for any purpose other than to solicit security holders with respect to the same meeting or action by consent or authorization for which the registrant is soliciting or intends to solicit or to communicate with security holders with respect to a solicitation commenced by the registrant; or disclose such information to any person other than an employee, agent, or beneficial owner for whom a request was made to the extent necessary to effectuate the communication or solicitation. The security holder shall return the information provided pursuant to paragraph (a)(2)(ii) of this section and shall not retain any copies thereof or of any information derived from such information after the termination of the solicitation.

(e) The security holder shall reimburse the reasonable expenses incurred by the registrant in performing the acts requested pursuant to paragraph (a) of this section.

Note 1 to § 240.14a-7. Reasonably prompt methods of distribution to security holders may be used instead of mailing. If an alternative distribution method is chosen, the costs of that method should be considered where necessary rather than the costs of mailing.

Note 2 to § 240.14a-7. When providing the information required by § 240.14a-7(a)(1)(ii), if the registrant has received affirmative written or implied consent to delivery of a single copy of proxy materials to a shared address in accordance with § 240.14a-3(e)(1), it shall exclude from the number of record holders those to whom it does not have to deliver a separate proxy statement.

Rule 14a-8. Shareholder Proposals.

This section addresses when a company must include a shareholder's proposal in its proxy statement and identify the proposal in its form of proxy when the company holds an annual or special meeting of shareholders. In summary, in order to have your shareholder proposal included on a company's proxy card, and included along with any supporting statement in its proxy statement, you must be eligible and follow certain procedures. Under a few specific circumstances, the company is permitted to exclude your proposal, but only after submitting its reasons to the Commission. We structured this section in a question-and-answer format so that it is easier to understand. The references to "you" are to a shareholder seeking to submit the proposal.

(a) **Question 1: What is a proposal?**

A shareholder proposal is your recommendation or requirement that the company and/or its board of directors take action, which you intend to present at a meeting of the company's shareholders. Your proposal should state as clearly as possible the course of action that you believe the company should follow. If your proposal is placed on the company's proxy card, the company must also provide in the form of proxy means for shareholders to specify by boxes a choice between approval or disapproval, or abstention. Unless otherwise indicated, the word "proposal" as used in this section refers both to your proposal, and to your corresponding statement in support of your proposal (if any).

(b) **Question 2: Who is eligible to submit a proposal, and how do I demonstrate to the company that I am eligible?**

(1) In order to be eligible to submit a proposal, you must have continuously held at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date you submit the proposal. You must continue to hold those securities through the date of the meeting.

(2) If you are the registered holder of your securities, which means that your name appears in the company's records as a shareholder, the company can verify your eligibility on its own, although you will still have to provide the company with a written statement that you intend to continue to hold the securities through the date of the meeting of shareholders. However, if like many shareholders you are not a registered holder, the company likely does not know that you are a shareholder, or how many shares you own. In this case, at the time you submit your proposal, you must prove your eligibility to the company in one of two ways:

(i) The first way is to submit to the company a written statement from the "record" holder of your securities (usually a broker or bank) verifying that, at the time you submitted your proposal, you continuously held the securities for at least one year. You must also include your own written statement that you intend to continue to hold the securities through the date of the meeting of shareholders; or

(ii) The second way to prove ownership applies only if you have filed a Schedule 13D, Schedule 13G, Form 3, Form 4 and/or Form 5, or amendments to those documents or updated forms, reflecting your ownership of the shares as of or before the date on which the one-year eligibility period begins. If you have filed one of these documents with the SEC, you may demonstrate your eligibility by submitting to the company:

(A) A copy of the schedule and/or form, and any subsequent amendments reporting a change in your ownership level;

(B) Your written statement that you continuously held the required number of shares for the one-year period as of the date of the statement; and

(C) Your written statement that you intend to continue ownership of the shares through the date of the company's annual or special meeting.

(c) **Question 3: How many proposals may I submit?**

Each shareholder may submit no more than one proposal to a company for a particular shareholders' meeting.

(d) **Question 4: How long can my proposal be?**

The proposal, including any accompanying supporting statement, may not exceed 500 words.

(e) **Question 5: What is the deadline for submitting a proposal?**

(1) If you are submitting your proposal for the company's annual meeting, you can in most cases find the deadline in last year's proxy statement. However, if the company did not hold an annual meeting last year, or has changed the date of its meeting for this year more than 30 days from last year's meeting, you can usually find the deadline in one of the company's quarterly reports on Form 10-Q (§ 249.308a of this chapter), or in shareholder reports of investment companies under § 270.30d-1 of this chapter of the Investment Company Act of 1940. In order to avoid controversy, shareholders should submit their proposals by means, including electronic means, that permit them to prove the date of delivery.

(2) The deadline is calculated in the following manner if the proposal is submitted for a regularly scheduled annual meeting. The proposal must be received at the company's principal executive offices not less than 120 calendar days before the date of the company's proxy statement

released to shareholders in connection with the previous year's annual meeting. However, if the company did not hold an annual meeting the previous year, or if the date of this year's annual meeting has been changed by more than 30 days from the date of the previous year's meeting, then the deadline is a reasonable time before the company begins to print and send its proxy materials.

(3) If you are submitting your proposal for a meeting of shareholders other than a regularly scheduled annual meeting, the deadline is a reasonable time before the company begins to print and send its proxy materials.

(f) **Question 6: What if I fail to follow one of the eligibility or procedural requirements explained in answers to Questions 1 through 4 of this Rule 14a-8?**

(1) The company may exclude your proposal, but only after it has notified you of the problem, and you have failed adequately to correct it. Within 14 calendar days of receiving your proposal, the company must notify you in writing of any procedural or eligibility deficiencies, as well as of the time frame for your response. Your response must be postmarked, or transmitted electronically, no later than 14 days from the date you received the company's notification. A company need not provide you such notice of a deficiency if the deficiency cannot be remedied, such as if you fail to submit a proposal by the company's properly determined deadline. If the company intends to exclude the proposal, it will later have to make a submission under Rule 14a-8 and provide you with a copy under Question 10 below, Rule 14a-8(j).

(2) If you fail in your promise to hold the required number of securities through the date of the meeting of shareholders, then the company will be permitted to exclude all of your proposals from its proxy materials for any meeting held in the following two calendar years.

(g) **Question 7: Who has the burden of persuading the Commission or its staff that my proposal can be excluded?**

Except as otherwise noted, the burden is on the company to demonstrate that it is entitled to exclude a proposal.

(h) **Question 8: Must I appear personally at the shareholders' meeting to present the proposal?**

(1) Either you, or your representative who is qualified under state law to present the proposal on your behalf, must attend the meeting to present the proposal. Whether you attend the meeting yourself or send a qualified representative to the meeting in your place, you should make sure that you, or your representative, follow the proper state law procedures for attending the meeting and/or presenting your proposal.

(2) If the company holds its shareholder meeting in whole or in part via electronic media, and the company permits you or your representative to present your proposal via such media, then you may appear through electronic media rather than traveling to the meeting to appear in person.

(3) If you or your qualified representative fail to appear and present the proposal, without good cause, the company will be permitted to exclude all of your proposals from its proxy materials for any meetings held in the following two calendar years.

(i) **Question 9: If I have complied with the procedural requirements, on what other bases may a company rely to exclude my proposal?**

(1) *Improper Under State Law:* If the proposal is not a proper subject for action by shareholders under the laws of the jurisdiction of the company's organization;

> *Note to Paragraph (i)(1):* Depending on the subject matter, some proposals are not considered proper under state law if they would be binding on the company if approved by shareholders. In our experience, most proposals that are cast as recommendations or requests that the board of directors take specified action are proper under state law. Accordingly, we

will assume that a proposal drafted as a recommendation or suggestion is proper unless the company demonstrates otherwise.

(2) ***Violation of Law:*** If the proposal would, if implemented, cause the company to violate any state, federal, or foreign law to which it is subject;

Note to Paragraph (i)(2): We will not apply this basis for exclusion to permit exclusion of a proposal on grounds that it would violate foreign law if compliance with the foreign law would result in a violation of any state or federal law.

(3) ***Violation of Proxy Rules:*** If the proposal or supporting statement is contrary to any of the Commission's proxy rules, including Rule 14a-9, which prohibits materially false or misleading statements in proxy soliciting materials;

(4) ***Personal Grievance; Special Interest:*** If the proposal relates to the redress of a personal claim or grievance against the company or any other person, or if it is designed to result in a benefit to you, or to further a personal interest, which is not shared by the other shareholders at large;

(5) ***Relevance:*** If the proposal relates to operations which account for less than 5 percent of the company's total assets at the end of its most recent fiscal year, and for less than 5 percent of its net earnings and gross sales for its most recent fiscal year, and is not otherwise significantly related to the company's business;

(6) ***Absence of Power/Authority:*** If the company would lack the power or authority to implement the proposal;

(7) ***Management Functions:*** If the proposal deals with a matter relating to the company's ordinary business operations;

(8) ***Director Elections***: If the proposal:

(i) Would disqualify a nominee who is standing for election;

(ii) Would remove a director from office before his or her term expired;

(iii) Questions the competence, business judgment, or character of one or more nominees or directors;

(iv) Seeks to include a specific individual in the company's proxy materials for election to the board of directors; or

(v) Otherwise could affect the outcome of the upcoming election of directors.

(9) ***Conflicts with Company's Proposal:*** If the proposal directly conflicts with one of the company's own proposals to be submitted to shareholders at the same meeting;

Note to Paragraph (i)(9): A company's submission to the Commission under this Rule 14a-8 should specify the points of conflict with the company's proposal.

(10) ***Substantially Implemented:*** If the company has already substantially implemented the proposal;

Note to Paragraph (i)(10): A company may exclude a shareholder proposal that would provide an advisory vote or seek future advisory votes to approve the compensation of executives as disclosed pursuant to Item 402 of Regulation S-K (§ 229.402 of this chapter) or any successor to Item 402 (a "say-on-pay vote") or that relates to the frequency of say-on-pay votes, provided that in the most recent shareholder vote required by § 240.14a-21(b) of this chapter a single year (*i.e.*, one, two, or three years) received approval of a majority of votes cast on the matter and the company has adopted a policy on the frequency of say-on-pay votes that is consistent with the choice of the majority of votes cast in the most recent shareholder vote required by § 240.14a-21(b) of this chapter.

(11) *Duplication:* If the proposal substantially duplicates another proposal previously submitted to the company by another proponent that will be included in the company's proxy materials for the same meeting;

(12) *Resubmissions:* If the proposal deals with substantially the same subject matter as another proposal or proposals that has or have been previously included in the company's proxy materials within the preceding 5 calendar years, a company may exclude it from its proxy materials for any meeting held within 3 calendar years of the last time it was included if the proposal received:

(i) Less than 3% of the vote if proposed once within the preceding 5 calendar years;

(ii) Less than 6% of the vote on its last submission to shareholders if proposed twice previously within the preceding 5 calendar years; or

(iii) Less than 10% of the vote on its last submission to shareholders if proposed three times or more previously within the preceding 5 calendar years; and

(13) *Specific Amount of Dividends:* If the proposal relates to specific amounts of cash or stock dividends.

(j) **Question 10: What procedures must the company follow if it intends to exclude my proposal?**

(1) If the company intends to exclude a proposal from its proxy materials, it must file its reasons with the Commission no later than 80 calendar days before it files its definitive proxy statement and form of proxy with the Commission. The company must simultaneously provide you with a copy of its submission. The Commission staff may permit the company to make its submission later than 80 days before the company files its definitive proxy statement and form of proxy, if the company demonstrates good cause for missing the deadline.

(2) The company must file six paper copies of the following:

(i) The proposal;

(ii) An explanation of why the company believes that it may exclude the proposal, which should, if possible, refer to the most recent applicable authority, such as prior Division letters issued under the rule; and

(iii) A supporting opinion of counsel when such reasons are based on matters of state or foreign law.

(k) **Question 11: May I submit my own statement to the Commission responding to the company's arguments?**

Yes, you may submit a response, but it is not required. You should try to submit any response to us, with a copy to the company, as soon as possible after the company makes its submission. This way, the Commission staff will have time to consider fully your submission before it issues its response. You should submit six paper copies of your response.

(l) **Question 12: If the company includes my shareholder proposal in its proxy materials, what information about me must it include along with the proposal itself?**

(1) The company's proxy statement must include your name and address, as well as the number of the company's voting securities that you hold. However, instead of providing that

information, the company may instead include a statement that it will provide the information to shareholders promptly upon receiving an oral or written request.

(2) The company is not responsible for the contents of your proposal or supporting statement.

(m) Question 13: What can I do if the company includes in its proxy statement reasons why it believes shareholders should not vote in favor of my proposal, and I disagree with some of its statements?

(1) The company may elect to include in its proxy statement reasons why it believes shareholders should vote against your proposal. The company is allowed to make arguments reflecting its own point of view, just as you may express your own point of view in your proposal's supporting statement.

(2) However, if you believe that the company's opposition to your proposal contains materially false or misleading statements that may violate our anti-fraud rule, Rule 14a-9, you should promptly send to the Commission staff and the company a letter explaining the reasons for your view, along with a copy of the company's statements opposing your proposal. To the extent possible, your letter should include specific factual information demonstrating the inaccuracy of the company's claims. Time permitting, you may wish to try to work out your differences with the company by yourself before contacting the Commission staff.

(3) We require the company to send you a copy of its statements opposing your proposal before it sends its proxy materials, so that you may bring to our attention any materially false or misleading statements, under the following timeframes:

(i) If our no-action response requires that you make revisions to your proposal or supporting statement as a condition to requiring the company to include it in its proxy materials, then the company must provide you with a copy of its opposition statements no later than 5 calendar days after the company receives a copy of your revised proposal; or

(ii) In all other cases, the company must provide you with a copy of its opposition statements no later than 30 calendar days before it files definitive copies of its proxy statement and form of proxy under Rule 14a-6.

Rule 14a-9. False or Misleading Statements.

(a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading.

(b) The fact that a proxy statement, form of proxy or other soliciting material has been filed with or examined by the Commission shall not be deemed a finding by the Commission that such material is accurate or complete or not false or misleading, or that the Commission has passed upon the merits of or approved any statement contained therein or any matter to be acted upon by security holders. No representation contrary to the foregoing shall be made.

(c) No nominee, nominating shareholder or nominating shareholder group, or any member thereof, shall cause to be included in a registrant's proxy materials, either pursuant to the Federal proxy rules, an applicable state or foreign law provision, or a registrant's governing documents as they relate to including shareholder nominees for director in a registrant's proxy materials, include in a notice on Schedule 14N (§ 240.14n-101), or include in any other related communication, any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to a solicitation for the same meeting or subject matter which has become false or misleading.

U.S. Securities and Exchange Commission

Division of Corporation Finance
Securities and Exchange Commission

Shareholder Proposals

Staff Legal Bulletin No. 14F (CF)

Action: Publication of CF Staff Legal Bulletin

Date: October 18, 2011

Summary: This staff legal bulletin provides information for companies and shareholders regarding Rule 14a-8 under the Securities Exchange Act of 1934.

Supplementary Information: The statements in this bulletin represent the views of the Division of Corporation Finance (the "Division"). This bulletin is not a rule, regulation or statement of the Securities and Exchange Commission (the "Commission"). Further, the Commission has neither approved nor disapproved its content.

Contacts: For further information, please contact the Division's Office of Chief Counsel by calling (202) 551-3500 or by submitting a web-based request form at https://www.sec.gov/forms/corp_fin_interpretive.

A. The purpose of this bulletin

This bulletin is part of a continuing effort by the Division to provide guidance on important issues arising under Exchange Act Rule 14a-8. Specifically, this bulletin contains information regarding:

- Brokers and banks that constitute "record" holders under Rule 14a-8 (b)(2)(i) for purposes of verifying whether a beneficial owner is eligible to submit a proposal under Rule 14a-8;
- Common errors shareholders can avoid when submitting proof of ownership to companies;
- The submission of revised proposals;
- Procedures for withdrawing no-action requests regarding proposals submitted by multiple proponents; and
- The Division's new process for transmitting Rule 14a-8 no-action responses by email.

You can find additional guidance regarding Rule 14a-8 in the following bulletins that are available on the Commission's website: SLB No. 14, SLB No. 14A, SLB No. 14B, SLB No. 14C, SLB No. 14D and SLB No. 14E.

B. The types of brokers and banks that constitute "record" holders under Rule 14a-8(b)(2)(i) for purposes of verifying whether a beneficial owner is eligible to submit a proposal under Rule 14a-8

1. Eligibility to submit a proposal under Rule 14a-8

To be eligible to submit a shareholder proposal, a shareholder must have continuously held at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the shareholder meeting for at least one year as of the date the shareholder submits the proposal. The shareholder must also continue to hold the required amount of securities through the date of the meeting and must provide the company with a written statement of intent to do so.[1]

The steps that a shareholder must take to verify his or her eligibility to submit a proposal depend on how the shareholder owns the securities. There are two types of security holders in the U.S.: registered owners and beneficial owners.[2] Registered owners have a direct relationship with the issuer because their ownership of shares is listed on the records maintained by the issuer or its transfer agent. If a shareholder is a registered owner, the company can independently confirm that the shareholder's holdings satisfy Rule 14a-8(b)'s eligibility requirement.

The vast majority of investors in shares issued by U.S. companies, however, are beneficial owners, which means that they hold their securities in book-entry form through a securities intermediary, such as a broker or a bank. Beneficial owners are sometimes referred to as "street name" holders. Rule 14a-8(b)(2)(i) provides that a beneficial owner can provide proof of ownership to support his or her eligibility to submit a proposal by submitting a written statement "from the 'record' holder of [the] securities (usually a broker or bank)," verifying that, at the time the proposal was submitted, the shareholder held the required amount of securities continuously for at least one year.[3]

2. The role of the Depository Trust Company

Most large U.S. brokers and banks deposit their customers' securities with, and hold those securities through, the Depository Trust Company ("DTC"), a registered clearing agency acting as a securities depository. Such brokers and banks are often referred to as "participants" in DTC.[4] The names of these DTC participants, however, do not appear as the registered owners of the securities deposited with DTC on the list of shareholders maintained by the company or, more typically, by its transfer agent. Rather, DTC's nominee, Cede & Co., appears on the shareholder list as the sole registered owner of securities deposited with DTC by the DTC participants. A company can request from DTC a "securities position listing" as of a specified date, which identifies the DTC participants having a position in the company's securities and the number of securities held by each DTC participant on that date.[5]

3. Brokers and banks that constitute "record" holders under Rule 14a-8(b)(2)(i) for purposes of verifying whether a beneficial owner is eligible to submit a proposal under Rule 14a-8

In *The Hain Celestial Group, Inc.* (Oct. 1, 2008), we took the position that an introducing broker could be considered a "record" holder for purposes of

Rule 14a-8(b)(2)(i). An introducing broker is a broker that engages in sales and other activities involving customer contact, such as opening customer accounts and accepting customer orders, but is not permitted to maintain custody of customer funds and securities.[6] Instead, an introducing broker engages another broker, known as a "clearing broker," to hold custody of client funds and securities, to clear and execute customer trades, and to handle other functions such as issuing confirmations of customer trades and customer account statements. Clearing brokers generally are DTC participants; introducing brokers generally are not. As introducing brokers generally are not DTC participants, and therefore typically do not appear on DTC's securities position listing, *Hain Celestial* has required companies to accept proof of ownership letters from brokers in cases where, unlike the positions of registered owners and brokers and banks that are DTC participants, the company is unable to verify the positions against its own or its transfer agent's records or against DTC's securities position listing.

In light of questions we have received following two recent court cases relating to proof of ownership under Rule 14a-8[7] and in light of the Commission's discussion of registered and beneficial owners in the Proxy Mechanics Concept Release, we have reconsidered our views as to what types of brokers and banks should be considered "record" holders under Rule 14a-8(b)(2)(i). Because of the transparency of DTC participants' positions in a company's securities, we will take the view going forward that, for Rule 14a-8(b)(2)(i) purposes, only DTC participants should be viewed as "record" holders of securities that are deposited at DTC. As a result, we will no longer follow *Hain Celestial*.

We believe that taking this approach as to who constitutes a "record" holder for purposes of Rule 14a-8(b)(2)(i) will provide greater certainty to beneficial owners and companies. We also note that this approach is consistent with Exchange Act Rule 12g5-1 and a 1988 staff no-action letter addressing that rule,[8] under which brokers and banks that are DTC participants are considered to be the record holders of securities on deposit with DTC when calculating the number of record holders for purposes of Sections 12(g) and 15(d) of the Exchange Act.

Companies have occasionally expressed the view that, because DTC's nominee, Cede & Co., appears on the shareholder list as the sole registered owner of securities deposited with DTC by the DTC participants, only DTC or Cede & Co. should be viewed as the "record" holder of the securities held on deposit at DTC for purposes of Rule 14a-8(b)(2)(i). We have never interpreted the rule to require a shareholder to obtain a proof of ownership letter from DTC or Cede & Co., and nothing in this guidance should be construed as changing that view.

How can a shareholder determine whether his or her broker or bank is a DTC participant?

Shareholders and companies can confirm whether a particular broker or bank is a DTC participant by checking DTC's participant list, which is currently available on the Internet at http://www.dtcc.com/~/media/Files/Downloads/client-center/DTC/alpha.ashx.

What if a shareholder's broker or bank is not on DTC's participant list?

The shareholder will need to obtain proof of ownership from the DTC participant through which the securities are held. The shareholder should be able to find out who this DTC participant is by asking the shareholder's broker or bank.[9]

If the DTC participant knows the shareholder's broker or bank's holdings, but does not know the shareholder's holdings, a shareholder could satisfy Rule 14a-8(b)(2)(i) by obtaining and submitting two proof of ownership statements verifying that, at the time the proposal was submitted, the required amount of securities were continuously held for at least one year – one from the shareholder's broker or bank confirming the shareholder's ownership, and the other from the DTC participant confirming the broker or bank's ownership.

How will the staff process no-action requests that argue for exclusion on the basis that the shareholder's proof of ownership is not from a DTC participant?

The staff will grant no-action relief to a company on the basis that the shareholder's proof of ownership is not from a DTC participant only if the company's notice of defect describes the required proof of ownership in a manner that is consistent with the guidance contained in this bulletin. Under Rule 14a-8(f)(1), the shareholder will have an opportunity to obtain the requisite proof of ownership after receiving the notice of defect.

C. Common errors shareholders can avoid when submitting proof of ownership to companies

In this section, we describe two common errors shareholders make when submitting proof of ownership for purposes of Rule 14a-8(b)(2), and we provide guidance on how to avoid these errors.

First, Rule 14a-8(b) requires a shareholder to provide proof of ownership that he or she has "continuously held at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the meeting for at least one year by the date you submit the proposal" (emphasis added).[10] We note that many proof of ownership letters do not satisfy this requirement because they do not verify the shareholder's beneficial ownership for the entire one-year period preceding and including the date the proposal is submitted. In some cases, the letter speaks as of a date *before* the date the proposal is submitted, thereby leaving a gap between the date of the verification and the date the proposal is submitted. In other cases, the letter speaks as of a date *after* the date the proposal was submitted but covers a period of only one year, thus failing to verify the shareholder's beneficial ownership over the required full one-year period preceding the date of the proposal's submission.

Second, many letters fail to confirm continuous ownership of the securities. This can occur when a broker or bank submits a letter that confirms the shareholder's beneficial ownership only as of a specified date but omits any reference to continuous ownership for a one-year period.

We recognize that the requirements of Rule 14a-8(b) are highly prescriptive and can cause inconvenience for shareholders when submitting proposals. Although our administration of Rule 14a-8(b) is constrained by the terms of the rule, we believe that shareholders can avoid the two errors highlighted above by arranging to have their broker or bank provide the required verification of ownership as of the date they plan to submit the proposal using the following format:

> "As of [date the proposal is submitted], [name of shareholder] held, and has held continuously for at least one year, [number of securities] shares of [company name] [class of securities]."[11]

As discussed above, a shareholder may also need to provide a separate written statement from the DTC participant through which the shareholder's securities are held if the shareholder's broker or bank is not a DTC participant.

D. The submission of revised proposals

On occasion, a shareholder will revise a proposal after submitting it to a company. This section addresses questions we have received regarding revisions to a proposal or supporting statement.

1. A shareholder submits a timely proposal. The shareholder then submits a revised proposal before the company's deadline for receiving proposals. Must the company accept the revisions?

Yes. In this situation, we believe the revised proposal serves as a replacement of the initial proposal. By submitting a revised proposal, the shareholder has effectively withdrawn the initial proposal. Therefore, the shareholder is not in violation of the one-proposal limitation in Rule 14a-8 (c).[12] If the company intends to submit a no-action request, it must do so with respect to the revised proposal.

We recognize that in Question and Answer E.2 of SLB No. 14, we indicated that if a shareholder makes revisions to a proposal before the company submits its no-action request, the company can choose whether to accept the revisions. However, this guidance has led some companies to believe that, in cases where shareholders attempt to make changes to an initial proposal, the company is free to ignore such revisions even if the revised proposal is submitted before the company's deadline for receiving shareholder proposals. We are revising our guidance on this issue to make clear that a company may not ignore a revised proposal in this situation.[13]

2. A shareholder submits a timely proposal. After the deadline for receiving proposals, the shareholder submits a revised proposal. Must the company accept the revisions?

No. If a shareholder submits revisions to a proposal after the deadline for receiving proposals under Rule 14a-8(e), the company is not required to accept the revisions. However, if the company does not accept the revisions, it must treat the revised proposal as a second proposal and submit a notice stating its intention to exclude the revised proposal, as required by Rule 14a-8(j). The company's notice may cite Rule 14a-8(e) as the reason for excluding the revised proposal. If the company does not accept the revisions and intends to exclude the initial proposal, it would also need to submit its reasons for excluding the initial proposal.

3. If a shareholder submits a revised proposal, as of which date must the shareholder prove his or her share ownership?

A shareholder must prove ownership as of the date the original proposal is submitted. When the Commission has discussed revisions to proposals,[14] it has not suggested that a revision triggers a requirement to provide proof of ownership a second time. As outlined in Rule 14a-8(b), proving ownership includes providing a written statement that the shareholder intends to continue to hold the securities through the date of the shareholder meeting. Rule 14a-8(f)(2) provides that if the shareholder "fails in [his or her] promise to hold the required number of securities through the date of the meeting of shareholders, then the company will be permitted to exclude all of [the same shareholder's] proposals from its proxy materials for any meeting held in the following two calendar years." With these provisions in mind, we do not interpret Rule 14a-8 as requiring additional proof of ownership when a shareholder submits a revised proposal.[15]

E. Procedures for withdrawing no-action requests for proposals submitted by multiple proponents

We have previously addressed the requirements for withdrawing a Rule 14a-8 no-action request in SLB Nos. 14 and 14C. SLB No. 14 notes that a company should include with a withdrawal letter documentation demonstrating that a shareholder has withdrawn the proposal. In cases where a proposal submitted by multiple shareholders is withdrawn, SLB No. 14C states that, if each shareholder has designated a lead individual to act on its behalf and the company is able to demonstrate that the individual is authorized to act on behalf of all of the proponents, the company need only provide a letter from that lead individual indicating that the lead individual is withdrawing the proposal on behalf of all of the proponents.

Because there is no relief granted by the staff in cases where a no-action request is withdrawn following the withdrawal of the related proposal, we recognize that the threshold for withdrawing a no-action request need not be overly burdensome. Going forward, we will process a withdrawal request if the company provides a letter from the lead filer that includes a representation that the lead filer is authorized to withdraw the proposal on behalf of each proponent identified in the company's no-action request.[16]

F. Use of email to transmit our Rule 14a-8 no-action responses to companies and proponents

To date, the Division has transmitted copies of our Rule 14a-8 no-action responses, including copies of the correspondence we have received in connection with such requests, by U.S. mail to companies and proponents. We also post our response and the related correspondence to the Commission's website shortly after issuance of our response.

In order to accelerate delivery of staff responses to companies and proponents, and to reduce our copying and postage costs, going forward, we intend to transmit our Rule 14a-8 no-action responses by email to companies and proponents. We therefore encourage both companies and proponents to include email contact information in any correspondence to each other and to us. We will use U.S. mail to transmit our no-action response to any company or proponent for which we do not have email contact information.

Given the availability of our responses and the related correspondence on the Commission's website and the requirement under Rule 14a-8 for companies and proponents to copy each other on correspondence submitted to the Commission, we believe it is unnecessary to transmit copies of the related correspondence along with our no-action response. Therefore, we intend to transmit only our staff response and not the correspondence we receive from the parties. We will continue to post to the Commission's website copies of this correspondence at the same time that we post our staff no-action response.

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1 *See* Rule 14a-8(b).

2 For an explanation of the types of share ownership in the U.S., see Concept Release on U.S. Proxy System, Release No. 34-62495 (July 14, 2010) [75 FR 42982] ("Proxy Mechanics Concept Release"), at Section II.A. The term "beneficial owner" does not have a uniform meaning under the federal securities laws. It has a different meaning in this bulletin as compared to "beneficial owner" and "beneficial ownership" in Sections 13 and 16 of the Exchange Act. Our use of the term in this bulletin is not intended to suggest that registered owners are not beneficial owners for purposes of those Exchange Act provisions. *See* Proposed Amendments to Rule 14a-8 under the Securities Exchange Act of 1934 Relating to Proposals by Security Holders, Release No. 34-12598 (July 7, 1976) [41 FR 29982], at n.2 ("The term 'beneficial owner' when used in the context of the proxy rules, and in light of the purposes of those rules, may be interpreted to have a broader meaning than it would for certain other purpose[s] under the federal securities laws, such as reporting pursuant to the Williams Act.").

3 If a shareholder has filed a Schedule 13D, Schedule 13G, Form 3, Form 4 or Form 5 reflecting ownership of the required amount of shares, the shareholder may instead prove ownership by submitting a copy of such filings and providing the additional information that is described in Rule 14a-8(b)(2)(ii).

4 DTC holds the deposited securities in "fungible bulk," meaning that there are no specifically identifiable shares directly owned by the DTC participants. Rather, each DTC participant holds a *pro rata* interest or position in the aggregate number of shares of a particular issuer held at DTC. Correspondingly, each customer of a DTC participant – such as an individual investor – owns a pro rata interest in the shares in which the DTC participant has a pro rata interest. *See* Proxy Mechanics Concept Release, at Section II.B.2.a.

5 *See* Exchange Act Rule 17Ad-8.

6 *See* Net Capital Rule, Release No. 34-31511 (Nov. 24, 1992) [57 FR 56973] ("Net Capital Rule Release"), at Section II.C.

7 *See KBR Inc. v. Chevedden*, Civil Action No. H-11-0196, 2011 U.S. Dist. LEXIS 36431, 2011 WL 1463611 (S.D. Tex. Apr. 4, 2011); *Apache Corp. v. Chevedden,* 696 F. Supp. 2d 723 (S.D. Tex. 2010). In both cases, the court concluded that a securities intermediary was not a record holder for purposes of Rule 14a-8(b) because it did not appear on a list of the

company's non-objecting beneficial owners or on any DTC securities position listing, nor was the intermediary a DTC participant.

[8] *Techne Corp.* (Sept. 20, 1988).

[9] In addition, if the shareholder's broker is an introducing broker, the shareholder's account statements should include the clearing broker's identity and telephone number. *See* Net Capital Rule Release, at Section II.C.(iii). The clearing broker will generally be a DTC participant.

[10] For purposes of Rule 14a-8(b), the submission date of a proposal will generally precede the company's receipt date of the proposal, absent the use of electronic or other means of same-day delivery.

[11] This format is acceptable for purposes of Rule 14a-8(b), but it is not mandatory or exclusive.

[12] As such, it is not appropriate for a company to send a notice of defect for multiple proposals under Rule 14a-8(c) upon receiving a revised proposal.

[13] This position will apply to all proposals submitted after an initial proposal but before the company's deadline for receiving proposals, regardless of whether they are explicitly labeled as "revisions" to an initial proposal, unless the shareholder affirmatively indicates an intent to submit a second, *additional* proposal for inclusion in the company's proxy materials. In that case, the company must send the shareholder a notice of defect pursuant to Rule 14a-8(f)(1) if it intends to exclude either proposal from its proxy materials in reliance on Rule 14a-8(c). In light of this guidance, with respect to proposals or revisions received before a company's deadline for submission, we will no longer follow *Layne Christensen Co.* (Mar. 21, 2011) and other prior staff no-action letters in which we took the view that a proposal would violate the Rule 14a-8(c) one-proposal limitation if such proposal is submitted to a company after the company has either submitted a Rule 14a-8 no-action request to exclude an earlier proposal submitted by the same proponent or notified the proponent that the earlier proposal was excludable under the rule.

[14] *See, e.g.*, Adoption of Amendments Relating to Proposals by Security Holders, Release No. 34-12999 (Nov. 22, 1976) [41 FR 52994].

[15] Because the relevant date for proving ownership under Rule 14a-8(b) is the date the proposal is submitted, a proponent who does not adequately prove ownership in connection with a proposal is not permitted to submit another proposal for the same meeting on a later date.

[16] Nothing in this staff position has any effect on the status of any shareholder proposal that is not withdrawn by the proponent or its authorized representative.

http://www.sec.gov/interps/legal/cfslb14f.htm

U.S. Securities and Exchange Commission

Division of Corporation Finance
Securities and Exchange Commission

Shareholder Proposals

Staff Legal Bulletin No. 14G (CF)

Action: Publication of CF Staff Legal Bulletin

Date: October 16, 2012

Summary: This staff legal bulletin provides information for companies and shareholders regarding Rule 14a-8 under the Securities Exchange Act of 1934.

Supplementary Information: The statements in this bulletin represent the views of the Division of Corporation Finance (the "Division"). This bulletin is not a rule, regulation or statement of the Securities and Exchange Commission (the "Commission"). Further, the Commission has neither approved nor disapproved its content.

Contacts: For further information, please contact the Division's Office of Chief Counsel by calling (202) 551-3500 or by submitting a web-based request form at https://www.sec.gov/forms/corp_fin_interpretive.

A. The purpose of this bulletin

This bulletin is part of a continuing effort by the Division to provide guidance on important issues arising under Exchange Act Rule 14a-8. Specifically, this bulletin contains information regarding:

- the parties that can provide proof of ownership under Rule 14a-8(b)(2)(i) for purposes of verifying whether a beneficial owner is eligible to submit a proposal under Rule 14a-8;
- the manner in which companies should notify proponents of a failure to provide proof of ownership for the one-year period required under Rule 14a-8(b)(1); and
- the use of website references in proposals and supporting statements.

You can find additional guidance regarding Rule 14a-8 in the following bulletins that are available on the Commission's website: SLB No. 14, SLB No. 14A, SLB No. 14B, SLB No. 14C, SLB No. 14D, SLB No. 14E and SLB No. 14F.

B. Parties that can provide proof of ownership under Rule 14a-8(b)(2)(i) for purposes of verifying whether a beneficial owner is eligible to submit a proposal under Rule 14a-8

1. Sufficiency of proof of ownership letters provided by affiliates of DTC participants for purposes of Rule 14a-8(b)(2)(i)

To be eligible to submit a proposal under Rule 14a-8, a shareholder must, among other things, provide documentation evidencing that the shareholder has continuously held at least $2,000 in market value, or 1%, of the company's securities entitled to be voted on the proposal at the shareholder meeting for at least one year as of the date the shareholder submits the proposal. If the shareholder is a beneficial owner of the securities, which means that the securities are held in book-entry form through a securities intermediary, Rule 14a-8(b)(2)(i) provides that this documentation can be in the form of a "written statement from the 'record' holder of your securities (usually a broker or bank)...."

In SLB No. 14F, the Division described its view that only securities intermediaries that are participants in the Depository Trust Company ("DTC") should be viewed as "record" holders of securities that are deposited at DTC for purposes of Rule 14a-8(b)(2)(i). Therefore, a beneficial owner must obtain a proof of ownership letter from the DTC participant through which its securities are held at DTC in order to satisfy the proof of ownership requirements in Rule 14a-8.

During the most recent proxy season, some companies questioned the sufficiency of proof of ownership letters from entities that were not themselves DTC participants, but were affiliates of DTC participants.[1] By virtue of the affiliate relationship, we believe that a securities intermediary holding shares through its affiliated DTC participant should be in a position to verify its customers' ownership of securities. Accordingly, we are of the view that, for purposes of Rule 14a-8(b)(2)(i), a proof of ownership letter from an affiliate of a DTC participant satisfies the requirement to provide a proof of ownership letter from a DTC participant.

2. Adequacy of proof of ownership letters from securities intermediaries that are not brokers or banks

We understand that there are circumstances in which securities intermediaries that are not brokers or banks maintain securities accounts in the ordinary course of their business. A shareholder who holds securities through a securities intermediary that is not a broker or bank can satisfy Rule 14a-8's documentation requirement by submitting a proof of ownership letter from that securities intermediary.[2] If the securities intermediary is not a DTC participant or an affiliate of a DTC participant, then the shareholder will also need to obtain a proof of ownership letter from the DTC participant or an affiliate of a DTC participant that can verify the holdings of the securities intermediary.

C. Manner in which companies should notify proponents of a failure to provide proof of ownership for the one-year period required under Rule 14a-8(b)(1)

As discussed in Section C of SLB No. 14F, a common error in proof of ownership letters is that they do not verify a proponent's beneficial ownership for the entire one-year period preceding and including the date the proposal was submitted, as required by Rule 14a-8(b)(1). In some cases, the letter speaks as of a date *before* the date the proposal was submitted, thereby leaving a gap between the date of verification and the date the proposal was submitted. In other cases, the letter speaks as of a date *after* the date the proposal was submitted but covers a period of only one year, thus failing to verify the proponent's beneficial ownership over the required full one-year period preceding the date of the proposal's submission.

Under Rule 14a-8(f), if a proponent fails to follow one of the eligibility or procedural requirements of the rule, a company may exclude the proposal only if it notifies the proponent of the defect and the proponent fails to correct it. In SLB No. 14 and SLB No. 14B, we explained that companies should provide adequate detail about what a proponent must do to remedy all eligibility or procedural defects.

We are concerned that companies' notices of defect are not adequately describing the defects or explaining what a proponent must do to remedy defects in proof of ownership letters. For example, some companies' notices of defect make no mention of the gap in the period of ownership covered by the proponent's proof of ownership letter or other specific deficiencies that the company has identified. We do not believe that such notices of defect serve the purpose of Rule 14a-8(f).

Accordingly, going forward, we will not concur in the exclusion of a proposal under Rules 14a-8(b) and 14a-8(f) on the basis that a proponent's proof of ownership does not cover the one-year period preceding and including the date the proposal is submitted unless the company provides a notice of defect that identifies the specific date on which the proposal was submitted and explains that the proponent must obtain a new proof of ownership letter verifying continuous ownership of the requisite amount of securities for the one-year period preceding and including such date to cure the defect. We view the proposal's date of submission as the date the proposal is postmarked or transmitted electronically. Identifying in the notice of defect the specific date on which the proposal was submitted will help a proponent better understand how to remedy the defects described above and will be particularly helpful in those instances in which it may be difficult for a proponent to determine the date of submission, such as when the proposal is not postmarked on the same day it is placed in the mail. In addition, companies should include copies of the postmark or evidence of electronic transmission with their no-action requests.

D. Use of website addresses in proposals and supporting statements

Recently, a number of proponents have included in their proposals or in their supporting statements the addresses to websites that provide more information about their proposals. In some cases, companies have sought to exclude either the website address or the entire proposal due to the reference to the website address.

In SLB No. 14, we explained that a reference to a website address in a proposal does not raise the concerns addressed by the 500-word limitation in Rule 14a-8(d). We continue to be of this view and, accordingly, we will continue to count a website address as one word for purposes of Rule 14a-8 (d). To the extent that the company seeks the exclusion of a website reference in a proposal, but not the proposal itself, we will continue to follow the guidance stated in SLB No. 14, which provides that references to website addresses in proposals or supporting statements could be subject to exclusion under Rule 14a-8(i)(3) if the information contained on the website is materially false or misleading, irrelevant to the subject matter of the proposal or otherwise in contravention of the proxy rules, including Rule 14a-9.[3]

In light of the growing interest in including references to website addresses in proposals and supporting statements, we are providing additional guidance on the appropriate use of website addresses in proposals and supporting statements.[4]

1. References to website addresses in a proposal or supporting statement and Rule 14a-8(i)(3)

References to websites in a proposal or supporting statement may raise concerns under Rule 14a-8(i)(3). In SLB No. 14B, we stated that the exclusion of a proposal under Rule 14a-8(i)(3) as vague and indefinite may be appropriate if neither the shareholders voting on the proposal, nor the company in implementing the proposal (if adopted), would be able to determine with any reasonable certainty exactly what actions or measures the proposal requires. In evaluating whether a proposal may be excluded on this basis, we consider only the information contained in the proposal and supporting statement and determine whether, based on that information, shareholders and the company can determine what actions the proposal seeks.

If a proposal or supporting statement refers to a website that provides information necessary for shareholders and the company to understand with reasonable certainty exactly what actions or measures the proposal requires, and such information is not also contained in the proposal or in the supporting statement, then we believe the proposal would raise concerns under Rule 14a-9 and would be subject to exclusion under Rule 14a-8(i)(3) as vague and indefinite. By contrast, if shareholders and the company can understand with reasonable certainty exactly what actions or measures the proposal requires without reviewing the information provided on the website, then we believe that the proposal would not be subject to exclusion under Rule 14a-8(i)(3) on the basis of the reference to the website address. In this case, the information on the website only supplements the information contained in the proposal and in the supporting statement.

2. Providing the company with the materials that will be published on the referenced website

We recognize that if a proposal references a website that is not operational at the time the proposal is submitted, it will be impossible for a company or the staff to evaluate whether the website reference may be excluded. In our view, a reference to a non-operational website in a proposal or supporting statement could be excluded under Rule 14a-8(i)(3) as irrelevant to the subject matter of a proposal. We understand, however, that a proponent may wish to include a reference to a website containing information related to the proposal but wait to activate the website until it becomes clear that the proposal will be included in the company's proxy materials. Therefore, we will not concur that a reference to a website may be excluded as irrelevant under Rule 14a-8(i)(3) on the basis that it is not yet operational if the proponent, at the time the proposal is submitted, provides the company with the materials that are intended for publication on the website and a representation that the website will become operational at, or prior to, the time the company files its definitive proxy materials.

3. Potential issues that may arise if the content of a referenced website changes after the proposal is submitted

To the extent the information on a website changes after submission of a proposal and the company believes the revised information renders the website reference excludable under Rule 14a-8, a company seeking our concurrence that the website reference may be excluded must submit a letter presenting its reasons for doing so. While Rule 14a-8(j) requires a company to submit its reasons for exclusion with the Commission no later than 80 calendar days before it files its definitive proxy materials, we may concur that the changes to the referenced website constitute "good cause" for the company to file its reasons for excluding the website reference after the 80-day deadline and grant the company's request that the 80-day requirement be waived.

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[1] An entity is an "affiliate" of a DTC participant if such entity directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the DTC participant.

[2] Rule 14a-8(b)(2)(i) itself acknowledges that the record holder is "usually," but not always, a broker or bank.

[3] Rule 14a-9 prohibits statements in proxy materials which, at the time and in the light of the circumstances under which they are made, are false or misleading with respect to any material fact, or which omit to state any material fact necessary in order to make the statements not false or misleading.

[4] A website that provides more information about a shareholder proposal may constitute a proxy solicitation under the proxy rules. Accordingly, we remind shareholders who elect to include website addresses in their proposals to comply with all applicable rules regarding proxy solicitations.

http://www.sec.gov/interps/legal/cfslb14g.htm

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CITY OF NEW YORK
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Michael Garland
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TEL: (212) 669-2517
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MGARLAN@COMPTROLLER.NYC.GOV

Received
DEC 0 REC'D
GC / CPO

November 29, 2019

Christine L. Connolly
Corporate Secretary
Dollar General Corporation
100 Mission Ridge
Goodlettsville, TN 37072

Dear Ms. Connolly:

I write in response to your correspondence, dated November 19, 2019, regarding the eligibility of the New York City Employees' Retirement System, the New York City Teachers' Retirement System, the New York City Police Pension Fund and the New York City Fire Pension Fund (the "Systems") to submit a shareholder proposal to Dollar General Corporation (the "Company"), in accordance with SEC Rule 14a-8 (b).

Enclosed please find letters from State Street Bank and Trust Company, the Systems' custodian bank, certifying that at the time the shareholder proposal was submitted to the Company, each held, continuously since October 31, 2018, at least $2,000 worth of shares of the Company's common stock. I hereby declare that each intends to continue to hold at least $2,000 worth of these securities through the date of the Company's next annual meeting.

State Street Bank and Trust Company has confirmed that it is a DTC participant.

Sincerely,

Michael Garland
Enclosures

STATE STREET.

Derek A. Farrell
Asst. Vice President, Client Services

State Street Bank and Trust Company
c/o NYC Office of the Comptroller
Municipal Building
One Centre Street
New York, NY 10007
Telephone: 347 749-2420
dfarrell@statestreet.com

November 29, 2019

Re: New York City Teachers' Retirement System

To whom it may concern,

Please be advised that State Street Bank and Trust Company, under DTC number 997, held in custody continuously, on behalf of the New York City Teachers' Retirement System, the below position from October 31, 2018 through today as noted below:

Security: DOLLAR GENERAL CORP

Cusip: 256677105

Shares: 186,700

Please don't hesitate to contact me if you have any questions.

Sincerely,

Derek A. Farrell

Derek A. Farrell
Assistant Vice President

STATE STREET.

Derek A. Farrell
Asst. Vice President, Client Services

State Street Bank and Trust Company
c/o NYC Office of the Comptroller
Municipal Building
One Centre Street
New York, NY 10007
Telephone: 347 749-2420
dfarrell@statestreet.com

November 29, 2019

Re: New York City Police Pension Fund

To whom it may concern,

Please be advised that State Street Bank and Trust Company, under DTC number 997, held in custody continuously, on behalf of the New York City Police Pension Fund, the below position from October 31, 2018 through today as noted below:

Security: DOLLAR GENERAL CORP

Cusip: 256677105

Shares: 93,077

Please don't hesitate to contact me if you have any questions.

Sincerely,

Derek A. Farrell
Assistant Vice President

STATE STREET.

Derek A. Farrell
Asst. Vice President, Client Services

State Street Bank and Trust Company
c/o NYC Office of the Comptroller
Municipal Building
One Centre Street
New York, NY 10007
Telephone: 347 749-2420
dfarrell@statestreet.com

November 29, 2019

Re: New York City Fire Pension Fund

To whom it may concern,

Please be advised that State Street Bank and Trust Company, under DTC number 997, held in custody continuously, on behalf of the New York City Fire Pension Fund, the below position from October 31, 2018 through today as noted below:

Security: DOLLAR GENERAL CORP

Cusip: 256677105

Shares: 5,551

Please don't hesitate to contact me if you have any questions.

Sincerely,

Derek A. Farrell

Derek A. Farrell
Assistant Vice President

STATE STREET.

Derek A. Farrell
Asst. Vice President, Client Services

State Street Bank and Trust Company
c/o NYC Office of the Comptroller
Municipal Building
One Centre Street
New York, NY 10007
Telephone: 347 749-2420
dfarrell@statestreet.com

November 29, 2019

Re: New York City Employee's Retirement System

To whom it may concern,

Please be advised that State Street Bank and Trust Company, under DTC number 997, held in custody continuously, on behalf of the New York City Employee's Retirement System, the below position from October 31, 2018 through today as noted below:

Security: DOLLAR GENERAL CORP

Cusip: 256677105

Shares: 175,341

Please don't hesitate to contact me if you have any questions.

Sincerely,

Derek A. Farrell

Derek A. Farrell
Assistant Vice President

Selene Julia

From: Garland, Michael <mgarlan@comptroller.nyc.gov>
Sent: Friday, December 20, 2019 3:17 PM
To: Selene Julia
Subject: Follow-up on New York City's shareholder proposal
Attachments: The growing use of mandatory arbitration.pdf

EXTERNAL MESSAGE: Exercise Caution

Selene,

I just got off the phone with Christine, who asked that I forward the attached report and below information to you in order to pass on to her. As long-term investors with a deeply rooted commitment to fair labor practices at our portfolio companies, we find the concerns detailed in this report troubling.

Here are some examples of companies that have recently taken steps to eliminate forced arbitration::

McDonalds
Here is a link to a statement put out by McDonald's in which the company states that "We do not and will not, as a condition of employment, require mandatory arbitration of harassment and discrimination claims;"(see https://corporate.mcdonalds.com/corpmcd/scale-for-good/our-people-and-communities/respecting-human-rights.html).

Google
See "Google Ends Forced Arbitration for All Employee Disputes", at https://www.nytimes.com/2019/02/21/technology/google-forced-arbitration.html

I appreciate Christine's time today and look forward to continuing the discussion.

In the meantime, best wishes for the holidays.

Regards,

Mike

MICHAEL GARLAND
Assistant Comptroller - Corporate Governance and Responsible Investment
Office of New York City Comptroller Scott M. Stringer, Bureau of Asset Management
1 Centre Street, 8th Floor North, New York, NY 10007
Office: 212-669-2517 | Fax: 212-669-4072 | Email: mgarlan@comptroller.nyc.gov

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Economic
Policy
Institute

The growing use of mandatory arbitration

Access to the courts is now barred for more than 60 million American workers

Report • By Alexander J.S. Colvin • September 27, 2017

Executive summary

In a trend driven by a series of Supreme Court decisions dating back to 1991, American employers are increasingly requiring their workers to sign mandatory arbitration agreements. Under such agreements, workers whose rights are violated can't pursue their claims in court but must submit to arbitration procedures that research shows overwhelmingly favor employers.

In reviewing the existing literature on the extent of this practice, we found that the share of workers subject to mandatory arbitration had clearly increased in the decade following the initial 1991 court decision: by the early 2000s, the share of workers subject to mandatory arbitration had risen from just over 2 percent (in 1992) to almost a quarter of the workforce. However, more recent data were not available. In order to obtain current data for our study, we conducted a nationally representative survey of nonunion private-sector employers regarding their use of mandatory employment arbitration.

This study finds that since the early 2000s, the share of workers subject to mandatory arbitration has more than doubled and now exceeds 55 percent. This trend has weakened the position of workers whose rights are violated, barring access to the courts for all types of legal claims, including those based on Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Family and Medical Leave Act, and the Fair Labor Standards Act.

In October 2017, the Supreme Court will hear a set of consolidated cases challenging the inclusion of class action waivers in arbitration agreements. Class action waivers bar employees from participating in class action lawsuits to address widespread violations of workers' rights in a workplace. The Court will rule on whether class action waivers are a violation of the National Labor Relations Act; their decision could have wide-reaching implications for workers' rights going forward.

Key findings of this study

- More than half—53.9 percent—of nonunion private-sector employers have mandatory arbitration

SECTIONS

procedures. Among companies with 1,000 or more employees, 65.1 percent have mandatory arbitration procedures.

- Among private-sector nonunion *employees*, 56.2 percent are subject to mandatory employment arbitration procedures. Extrapolating to the overall workforce, this means that 60.1 million American workers no longer have access to the courts to protect their legal employment rights and instead must go to arbitration.
- Of the employers who require mandatory arbitration, 30.1 percent also include class action waivers in their procedures—meaning that in addition to losing their right to file a lawsuit on their own behalf, employees also lose the right to address widespread rights violations through collective legal action.
- Large employers are more likely than small employers to include class action waivers, so the share of *employees* affected is significantly higher than the share of employers engaging in this practice: of *employees* subject to mandatory arbitration, 41.1 percent have also waived their right to be part of a class action claim. Overall, this means that 23.1 percent of private-sector nonunion employees, or 24.7 million American workers, no longer have the right to bring a class action claim if their employment rights have been violated.

Introduction

Mandatory arbitration is a controversial practice in which a business requires employees or consumers to agree to arbitrate legal disputes with the business rather than going to court. Although seemingly voluntary in that the employee or consumer can choose whether or not to sign the arbitration agreement, in practice signing the agreement is required if the individual wants to get the job or to obtain the cellphone, credit card, or other consumer product the business is selling. Mandatory arbitration agreements are legally enforceable and effectively bar employees or consumers from going to court, instead diverting legal claims into an arbitration procedure that is established by the agreement drafted by the company and required as a condition of employment or of doing business with it.[1]

Much attention has focused on the use of mandatory arbitration agreements in consumer contracts, such as consumer financial contracts, cellphone contracts, and nursing home resident contracts and the implications of such agreements for consumer rights.[2] There is less awareness of the use of mandatory arbitration agreements in employment contracts, but it is no less of a concern for those workers affected by it. These mandatory employment arbitration agreements bar access to the courts for all types of legal claims, including those based on Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Family and Medical Leave Act, and the Fair Labor Standards Act. If an employment right protected by a federal or state statute has been violated and the affected worker has signed a mandatory arbitration agreement, that worker does not have access to the courts and instead must handle the claim through the arbitration procedure designated in the agreement.

Mandatory employment arbitration is very different from the labor arbitration system used to resolve disputes between unions and management in unionized workplaces. Labor arbitration is a bilateral system jointly run by unions and management, while mandatory employment arbitration procedures are unilaterally developed and forced on employees by employers. Whereas labor arbitration deals with the enforcement of a contract privately negotiated between a union and an employer, mandatory employment arbitration concerns employment laws established in statutes. Research has found that employees are less likely to win arbitration cases and they recover lower damages in mandatory employment arbitration than in the courts. Indeed, employers have a significant advantage in the process given that they are the ones who define the mandatory arbitration procedures and select the arbitration providers.[3]

Background: The Supreme Court's role in the increased use of mandatory employment arbitration agreements

A crucial 1991 Supreme Court decision, *Gilmer v. Interstate/Johnson Lane*,[4] upheld the enforceability of mandatory employment arbitration agreements, meaning that such agreements now had the potential to substantially change how the employment rights of American workers are protected. But the practical impact of mandatory employment arbitration depends on whether or not American businesses decide to require that their employees sign these agreements as a term and condition of employment. Research from the 1990s and 2000s found that mandatory employment arbitration was expanding and by the early 2000s nearly one-quarter of the workforce was subject to mandatory arbitration. However there was a lack of subsequent research tracking whether this growth trend had continued beyond the early 2000s and describing the current extent of mandatory employment arbitration (see literature review, next section below).

The lack of basic data on the extent of mandatory arbitration is especially concerning given that recent years have seen a series of court decisions encouraging the expanded use of mandatory arbitration. In two key decisions, *AT&T Mobility LLC v. Concepcion* (2011) and *American Express Co. v. Italian Colors Restaurant* (2013),[5] the Supreme Court held that class action waivers in mandatory arbitration agreements were broadly enforceable. This meant that businesses could not only use mandatory arbitration agreements to bar access to the courts for individual claims, but they could also shield themselves from class action claims. This gave businesses an additional incentive to include mandatory arbitration agreements in employment and other contracts.

In October 2017, the Supreme Court will hear a consolidated set of cases (*Murphy Oil/Epic Systems/Ernst & Young*) challenging the enforceability of class action waivers in mandatory employment arbitration agreements.[6] In this set of cases, the central issue is whether requiring this waiver of the ability to use collective action to address employment law violations is a violation of the protections of the right to engage in concerted action contained in Section 7 of the National Labor Relations Act (NLRA). If the Supreme Court accepts the argument that such waivers are in violation of the NLRA, the Court's decision would effectively put an end to the use of class action waivers in mandatory employment arbitration agreements. However, if the Court sides with the employers' arguments in these cases, this will signal to businesses that the last potential barrier to their ability to opt out of class actions has been removed. This would likely encourage businesses to adopt mandatory employment arbitration and class action waivers even more widely.

Existing research on the extent of mandatory employment arbitration

Despite growing attention to the issue of mandatory employment arbitration, there is a lack of good data on how widespread it has become. A 1992 academic study of conflict resolution procedures used by corporations in nonunion workplaces found that 2.1 percent of the companies surveyed included arbitration in their procedures.[7] The one major governmental effort to investigate the extent of mandatory arbitration was a 1995 GAO survey, which found that 7.6 percent of establishments had adopted mandatory employment arbitration.[8]

Colvin's 2003 survey of conflict resolution procedures used in the telecommunications industry found that 14.1 percent of establishments in that industry had adopted mandatory arbitration and that these procedures applied to 22.7 percent of the nonunion workforce in the industry (since larger establishments were more likely to have adopted mandatory arbitration).[9]

The overall picture we have is one of mandatory employment arbitration expanding through the 1990s and early 2000s to nearly a quarter of the workforce. This study seeks to determine whether this expansion has continued beyond 2003 and how widespread mandatory employment arbitration is currently.

Findings of this study

To investigate the extent of mandatory employment arbitration, we conducted a national survey of private-sector American business establishments, focusing on the use of mandatory arbitration for nonunion employees. The survey was conducted from March to July 2017 and had a sample size of 627, yielding a margin of error at 95 percent confidence of plus or minus 3.9 percentage points.

More than half of private-sector nonunion workers are subject to mandatory arbitration

On the central question of whether employees were required to sign a mandatory "agreement or provision for arbitration of legal disputes with the company," 50.4 percent of respondents indicated that employees in their establishment were required to enter into this type of agreement.

Although mandatory employment arbitration is usually established by having employees sign an arbitration agreement, typically at the time of hiring, in some instances businesses adopt arbitration procedures simply by announcing that these procedures have been incorporated into the organization's employment policies. An additional 3.5 percent of establishments had adopted mandatory arbitration using this second mechanism. Combined with the 50.4 percent of employers who require employees to sign an agreement, this means that a total of 53.9 percent of all establishments in the survey had adopted mandatory employment arbitration through one of these two mechanisms.

The establishments that have adopted mandatory arbitration tend to be those with larger workforces. Adjusting for workforce size, overall 56.2 percent of employees in the establishments surveyed were subject to mandatory arbitration procedures. Extrapolating to the overall private-sector nonunion workforce, this corresponds to 60.1 million American workers who are now subject to mandatory employment arbitration procedures and no longer have the right to go to court to challenge violations of their employment rights.[10]

Larger companies are more likely to adopt mandatory employment arbitration than smaller companies

As mentioned above, the likelihood that an employer will adopt mandatory employment arbitration varies with the size of the employer. Whereas 53.9 percent of all establishments had mandatory arbitration, among establishments that were part of companies with 1,000 or more employees, 65.1 percent had mandatory arbitration. In general, larger organizations with more sophisticated human resource policies and better legal counsel are more likely to adopt policies like mandatory arbitration that protect them against legal liability.[11] They could also become trendsetters over time if smaller employers copy these practices that larger employers have proven to be effective in protecting employers against legal actions.

Mandatory arbitration discourages employees from bringing claims when their rights are violated

Although around 60 million American workers are now subject to mandatory employment arbitration procedures, this does not mean that the number of workers arbitrating workplace disputes has increased correspondingly. It has not. Mandatory arbitration has a tendency to suppress claims. Attorneys who represent employees are less likely to take on clients who are subject to mandatory arbitration,[12] given that arbitration claims are less likely to succeed than claims brought to court and, when damages *are* awarded, they are likely to be significantly smaller than court-awarded damages.[13] Attorney reluctance to handle such claims effectively reduces the number of claims that are brought since, in practice, relatively few employees are able to bring employment law claims without the help of an attorney.

In an earlier study, Colvin and Gough (2015) found that an average of 940 mandatory employment arbitration cases per year were being filed with the American Arbitration Association (AAA), the nation's largest employment arbitration service provider.[14] Other research indicates that about 50 percent of mandatory employment arbitration cases are administered by the AAA.[15] This means that there are only about 1,880 mandatory employment arbitration cases filed per year nationally. Given the finding that 60.1 million American workers are now subject to these procedures, this means that only 1 in 32,000 employees subject to these procedures actually files a claim under them each year. These findings indicate that employers adopting mandatory employment arbitration have been successful in coming up with a mechanism that effectively reduces their chance of being subject to any liability for employment law violations to very low levels.

In addition to losing their right to private legal action, nearly 25 million of these workers are also prohibited from participating in class action suits

Although class action waivers are one of the most controversial features of mandatory arbitration procedures, it is important to recognize that mandatory arbitration agreements do not necessarily include class action waivers. Among the survey respondents whose companies had mandatory arbitration procedures, 30.1 percent included class action waivers. These tended to be in establishments with larger workforces, so overall 41.1 percent of employees subject to mandatory arbitration procedures were also subject to class action waivers. Relative to the overall workforce, including both those subject to and those not subject to mandatory arbitration, these estimates indicate that 23.1 percent of all private-sector nonunion employees are subject to class action waivers in mandatory arbitration procedures, corresponding to 24.7 million American workers.

The finding that many employers who have adopted mandatory employment arbitration have not included class action waivers in their procedures stands in contrast to the situation with consumer financial contracts, which the CFPB found almost always include class action waivers along with mandatory arbitration.[16] One explanation for the lower use of class action waivers in the employment setting is the ongoing legal uncertainty about their enforceability given the NLRA issues that the Supreme Court will be deciding in the upcoming *Murphy Oil/Epic Systems/Ernst & Young* cases.

Conclusion: Mandatory arbitration is a growing threat to workers' rights

Mandatory employment arbitration is the subject of fierce legal and policy debates. There is growing evidence that mandatory arbitration produces outcomes different from those of litigation, to the disadvantage of employees, and suffers from due process problems that give the advantage to the employers who impose mandatory arbitration on their workers.[17] What has been less clear is how widespread the impact of mandatory employment arbitration is. In the consumer arena, the CFPB's 2015 study showed that mandatory arbitration clauses are common, being included in a majority of credit card, prepaid card, student loan, and payday loan agreements.[18] By contrast, in the employment arena our knowledge of the extent of mandatory arbitration was limited to a few surveys from the 1990s and early 2000s, the latter of which suggested that nearly a quarter of employees might have been subject to mandatory arbitration by that point in time.

The study described in this report shows that mandatory employment arbitration has continued to grow in extent, and now, in 2017, in over half of American workplaces, employees are subject to mandatory arbitration agreements that take away their right to bring claims against their employer in court. This represents a dramatic and important shift in how the employment rights of American workers are enforced. Rather than having their rights adjudicated through the public courts and decided by juries of their peers, more often now American workers have to bring claims—claims that are based on statutes enacted by Congress or state legislatures—through arbitral forums designated by agreements that their own employers drafted and required them to agree to as a condition of employment.

The employment conditions experienced by the American worker have changed dramatically in recent decades as labor standards and their enforcement have eroded, union representation has declined, and the wage-suppressing effects of globalization have been amplified by an overvalued U.S. dollar and trade agreements that have eroded workers' power. Against this backdrop of increased economic risk and uncertainty for workers and the disruption of traditional protections, laws protecting employment rights such as the minimum wage, the right to equal pay, and the right to a safe workplace free of harassment or discrimination based on race, gender, or religion have become increasingly important as a workplace safety net. However, these protections are at risk of being undermined if there is no effective means of enforcing them.

Mandatory employment arbitration has expanded to the point where it has now surpassed court litigation as the most common process through which the rights of American workers are adjudicated and enforced. It is likely to become an even more widespread practice if the Supreme Court upholds the enforceability of class action waivers in its October 2017 decision. In fact, if the Court rules in favor of the employers in these cases, imposing mandatory arbitration with class action waivers is likely to become the predominant management practice and workers will find it exponentially more difficult to enforce their rights going forward.

About the author

Alexander J.S. Colvin is the Martin F. Scheinman Professor of Conflict Resolution and Associate Dean for Academic Affairs, Diversity, and Faculty Development at the ILR School, Cornell University. His research and teaching focuses on employment dispute resolution, with a particular emphasis on procedures in nonunion workplaces and the impact of the legal environment on organizations.

Methodological appendix

To measure the current extent of mandatory employment arbitration, we conducted a national-level survey of private-sector employers. The survey was funded by the Economic Policy Institute and administered through telephone- and web-based methods by the Survey Research Institute (SRI) at Cornell University.

The study measured the extent of mandatory employment arbitration by surveying employers rather than by surveying employees because research has found that employees are often unaware or fail to recall that they have signed arbitration agreements and may not understand the content and meaning of these documents.[19] The survey was limited to private-sector employers because public-sector employees typically have their employment regulated by specific public-sector employment laws and employment practices differ substantially between private- and public-sector employers. The survey focused on nonunion employees since unionized employees have their employment governed by collective bargaining agreements, which provide for labor arbitration to resolve disputes. Although both are forms of arbitration, labor arbitration differs in many respects from mandatory employment arbitration and should not be included in the same category.[20]

The survey population was drawn from Dun & Bradstreet's national marketing database of business establishments. It was stratified by state population to be nationally representative. The survey population was restricted to private-sector business establishments of 50 or more employees, and the analysis was restricted to procedures affecting nonunion employees. The individual respondents were the establishment's human resources manager or whichever individual was responsible for hiring and onboarding employees. The reason for use of this individual as the person to respond to the survey is that mandatory arbitration agreements are typically signed as part of the onboarding paperwork when a new employee is hired. As a result, the manager responsible for this process is the individual most likely to be knowledgeable about the documents the new employee is signing. Typical job titles of individual respondents included human resource director, human resource manager, personnel director, and personnel manager.

Participants were initially contacted by telephone and then given the option of completing phone or web versions of the survey. Follow-up calls were made to encourage participation. Where participants had provided email addresses, a series of emails were also sent to prompt completion of the survey. To encourage participation, respondents were offered the opportunity to win one of ten $100 Amazon gift cards in a raffle drawing from among participants in the survey.

Data collection started in March 2017 and was completed in July 2017. A total of 1,530 establishments were surveyed, from which 728 responses were obtained, representing an overall response rate of 47.6 percent. Some survey responses had missing data on specific questions; however, 627 respondents provided complete data on the key variables of interest. The response rate and sample size are similar to those obtained in past establishment-level surveys of employment relations and human resource practices. The median establishment size in the sample is 90 employees, and the average size is 226 employees. Most establishments are single-site businesses, while 38.2 percent are part of larger organizations. These larger organizations have an average workforce size of 18,660 employees. Overall, 5.2 percent of establishments in the sample are foreign-owned.

Endnotes

1. For a general discussion of the state of the law and practice around mandatory arbitration, see Stone and Colvin 2015.

2. The Consumer Financial Protection Bureau conducted a study of the widespread use of mandatory arbitration in consumer financial contracts and has proposed a rule limiting the use of class action waivers in these agreements. Mandatory arbitration in nursing home resident contracts was the focus of a proposed rule by the Obama administration banning their use.

3. For an overview of this research, see Stone and Colvin 2015, 18–23.

4. 500 U.S. 20 (1991).

5. *AT&T Mobility LLC v. Concepcion* 563 U.S. 333 (2011); *American Express Co. v. Italian Colors Restaurant* 133 S. Ct. 594 (2013).

6. *NLRB v. Murphy Oil USA, Inc.*, No. 16-307; *Epic Systems Corp. v. Lewis*, No. 16-285; *Ernst & Young LLP v. Morris*, No. 16-300. For more about the *Murphy Oil/Epic Systems/Ernst & Young* cases and the implications of the pending Supreme Court decision, see McNicholas 2017.

7. See Feuille and Chachere 1995, 31.

8. GAO 1995. The GAO's survey initially indicated that 9.9 percent of establishments had mandatory arbitration procedures; however, on follow-up a number of them indicated that they had made mistakes in reporting, such as confusing union labor arbitration procedures with nonunion mandatory employment arbitrations. Adjusting for these erroneous responses, only 7.6 percent of the establishments actually had mandatory employment arbitration.

9. See Colvin 2008.

10. This estimate is based on the Bureau of Labor Statistics report "Union Members – 2016," released January 26, 2017, which reports an overall private-sector workforce of 115.417 million, among which 8.437 million are union-represented private-sector workers, with the remaining 106.980 million workers being nonunion.

11. See, e.g., Edelman 1992, showing that larger organizations are more likely to adopt organizational policies designed to protect them from the impact of civil rights laws.

12. See Colvin 2014.

13. See Colvin and Gough 2015.

14. See Colvin and Gough 2015 (1027), reporting that 10,335 claims were filed with the AAA over the 11-year period from 2003–2013.

15. See Stone and Colvin 2015, 17.

16. The Consumer Financial Protection Bureau's Arbitration Study found that over 90 percent of consumer financial contract arbitration clauses that it studied contained class action waivers (CFPB 2015).

17. See Stone and Colvin 2015.

18. CFPB 2015.

19. A study by Zev Eigen (2008) found that a majority of Circuit City employees he interviewed were unaware that they had signed arbitration agreements or of the import of such agreements, even though the company had a longstanding policy of requiring its employees to sign mandatory arbitration agreements and even though Circuit City's arbitration policy had been the subject of an important case on the enforceability of these agreements that was decided by the Supreme Court in 2001.

20. One of the most important differences is that labor arbitration procedures are jointly established and administered by unions and management, in contrast to mandatory arbitration, which is unilaterally established by the employer. In addition, most labor arbitration procedures do not bar employees from bringing statutory employment claims separately through the courts.

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