

# CtW Investment Group

February 18, 2020

Via e-mail at [shareholderproposals@sec.gov](mailto:shareholderproposals@sec.gov)

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

Re: Request by Walmart Inc. to omit proposal submitted by CtW Investment Group

Ladies and Gentlemen,

Pursuant to Rule 14a-8 under the Securities Exchange Act of 1934, CtW Investment Group ("CtW") submitted a shareholder proposal (the "Proposal") to Walmart Inc. ("Walmart" or the "Company"). The Proposal asks Walmart's board to report to shareholders on the Company's use of provisions requiring employees of Walmart to arbitrate employment-related claims.

In a letter to the Division dated February 3, 2020 (the "No-Action Request"), Walmart stated that it intends to omit the Proposal from its proxy materials to be distributed to shareholders in connection with the Company's 2020 annual meeting of shareholders. Walmart argues that it is entitled to exclude the Proposal in reliance on Rule 14a-8(i)(7), on the ground that the Proposal deals with Walmart's ordinary business operations. As discussed more fully below, Walmart has not met its burden of proving its entitlement to exclude the Proposal on that basis, and we respectfully request that Walmart's request for relief be denied.

## **The Proposal**

The Proposal states:

RESOLVED that shareholders of Walmart Inc. ("Walmart") 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 Walmart to arbitrate employment-related claims. The report should specify the proportion of the workforce subject to such provisions and any changes in policy or practice Walmart has made, or intends to make, as a result of California's ban on agreeing to arbitration as a condition of employment.

## **Ordinary Business**

Rule 14a-8(i)(7) allows exclusion of proposals related to a company's ordinary business operations. Walmart argues that the Proposal relates to the Company's ordinary business operations because it addresses the management of its workforce and would micromanage Walmart by limiting the use of mandatory arbitration provisions.

### Mandatory Arbitration of Workplace Claims is a Significant Policy Issue

Companies are not allowed to rely on the ordinary business exclusion to omit proposals addressing "management of the workforce," which generally do not transcend ordinary business, if they "focus[] on sufficiently significant social policy issues."<sup>1</sup> To determine whether a topic qualifies as a significant social policy issue, the Division analyzes whether it is a "consistent topic of widespread public debate." Mandatory arbitration satisfies that standard.

The Staff has previously found that mandatory arbitration of employment-related claims is a significant policy issue. Last season, CBRE Group, Inc. challenged on ordinary business grounds a proposal asking the company to "report on the impact of mandatory arbitration policies on the Company's employees . . . [and] evaluate the risks that may result from the Company's current mandatory arbitration policy on claims of sexual harassment."<sup>2</sup> CBRE framed the subject of the proposal, as Walmart does here, as "the Company's contractual relationships with its employees," which according to CBRE involved balancing legal and regulatory regimes, the logistics of workforce management, the welfare of employees, and the interests of all the company's stakeholders. The Staff disagreed, stating that the proposal's subject "transcends ordinary business matters."

The CBRE proposal, unlike the Proposal, specifically mentioned sexual harassment claims in the resolved clause, as Walmart points out in the No-Action Request. But the Proposal's supporting statement makes clear that a major concern about arbitrating employment-related claims is denying sexual harassment and assault victims their day in court. The Proposal's scope would include other kinds of claims that also involve significant policy issues, such as discrimination on the basis of race or religion. The significance of the CBRE determination is that the Staff did not accept the company's arguments that exclusion was appropriate because mandatory arbitration is accomplished through contracts with employees. That reasoning should apply with equal force to Walmart's effort to exclude the Proposal.

Walmart relies heavily on three determinations from last season in Amazon.com, Inc., XPO Logistics and Yum! Brands, allowing the companies to exclude proposals we sponsored. Those proposals were much broader than the Proposal, requesting that companies not engage in any "inequitable employment

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<sup>1</sup> Exchange Act Release No. 40018 (May 21, 1998) (the "1998 Release").

<sup>2</sup> CBRE Group, Inc. (Mar. 6, 2019).

practices,” which included not only mandatory arbitration but also the use of non-compete, no-poaching, and, in certain circumstances, non-disclosure agreements. The Staff concurred with the companies’ arguments that the suite of practices, considered together, were not a significant social policy issue. In response, CtW reformulated the proposal to focus solely on mandatory arbitration, the employment practice that has generated the most intense controversy as reflected in media coverage, legislative and regulatory initiatives. It is thus unsurprising that some language from the inequitable employment practices proposals’ supporting statements is similar to the Proposal’s language.<sup>3</sup>

The use of mandatory arbitration provisions for employment-related claims continues to generate controversy, and the CtW believes that the practice is a significant policy issue independent of its link to sexual harassment. There has been consistent and widespread debate over the fairness of forcing employees to give up their right to sue, given workers’ lack of bargaining power. Mandatory arbitration also promotes secrecy, which can allow wrongdoing to continue. Press coverage has been intense, as high-profile figures in the entertainment world, organized groups of tech workers, members of Congress and presidential candidates have expressed opposition to mandatory arbitration. A non-exhaustive list of articles is attached hereto as Exhibit A.

Democratic presidential hopefuls have weighed in on the issue. Elizabeth Warren has announced a plan to combat mandatory arbitration. She has stated that she would, if elected, ban federal contractors from requiring employees to agree to arbitrate claims.<sup>4</sup> Bernie Sanders’ official website condemns the practice.<sup>5</sup> Then-candidate Kamala Harris criticized the mandatory arbitration policy in place at her husband’s law firm, where a female partner accused another partner of sexually assaulting her. Harris issued a statement that she “has long opposed forced arbitration agreements and that position has not changed and she does not believe this is any exception.”<sup>6</sup> Six Democratic senators in the race co-sponsored the Restoring Justice for Workers Act, which would ban forced arbitration of employment claims, not just those alleging sexual harassment.<sup>7</sup>

Last year, Google agreed to stop requiring arbitration of employment-related claims, following an earlier agreement not to use it for sexual harassment claims. Twenty thousand Google employees had participated in a walkout to protest the

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<sup>3</sup> See No-Action Request, at 8.

<sup>4</sup> <https://thinkprogress.org/elizabeth-warren-has-a-plan-to-save-american-workers-from-neil-gorsuch-722b24f3898b/>

<sup>5</sup> <https://berniesanders.com/issues/corporate-accountability-and-democracy/>

<sup>6</sup> Corky Siemaszko, “Kamala Harris Responds to Alleged Sex Assault at Her Husband’s Law Firm,” NCBnews.com, Oct. 8, 2019 (<https://www.nbcnews.com/politics/politics-news/kamala-harris-forced-address-alleged-sex-assault-husband-s-law-n1063321>)

<sup>7</sup> <https://www.congress.gov/bill/116th-congress/house-bill/2749>

practice. Other tech companies made similar changes.<sup>8</sup> Even after Google changed its policy, Google employees (through Googlers for Ending Forced Arbitration) are still involved in the issue, lobbying Congress for a ban on the practice.<sup>9</sup>

Gretchen Carlson, a former Fox News host whose suit against sexual harasser Roger Ailes was able to proceed only because she did not sue Fox itself, also continues to campaign against mandatory arbitration provisions. In May 2019, she testified before the House Judiciary Subcommittee.<sup>10</sup> The issue has had high visibility in popular culture: Late last year, “Bombshell,” a movie about Carlson’s treatment by Fox, as well as that of Megyn Kelly, was released.<sup>11</sup> A Showtime mini-series, “The Loudest Voice,” also depicted Carlson’s experience.<sup>12</sup> In December 2019, Carlson and another survivor started a nonprofit, “Lift Our Voices,” aimed at ending the use of mandatory arbitration provisions and nondisclosure agreements.<sup>13</sup>

Focus on mandatory arbitration for employment-related claims has not been limited to the sexual harassment context. Late last year, LGBTQ organizations at 14 top law schools, including Harvard and Yale, announced that they would no longer take funding from or promote firms that impose arbitration on employees, citing the impact of such provisions on employees’ ability to obtain redress for

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<sup>8</sup> Daisuke Wakabayashi, “Google Ends Forced Arbitration for All Employee Disputes,” *The New York Times*, Feb. 21, 2019 (<https://www.nytimes.com/2019/02/21/technology/google-forced-arbitration.html>); see also, e.g., Gerrit De Vynck et al., “Google Curbs Forced Arbitration After Protest on Harassment,” *Bloomberg*, Nov. 8, 2018 (<https://www.bloomberg.com/news/articles/2018-11-08/google-changes-policies-on-sexual-misconduct-after-staff-walkout>); Kerri Anne Renzulli, “Workers at Google, Facebook, eBay and Airbnb Can Now Sue Over Sexual Harassment—Here’s What That Means for Employees,” *CNBC.com*, Nov. 19, 2018 (<https://www.cnn.com/2018/11/19/google-facebook-airbnb-employees-can-now-sue-over-sexual-harassment.html>); Daisuke Wakabayashi & Jessica Silver-Greenberg, “Facebook to Drop Forced Arbitration in Harassment Cases,” *The New York Times*, Nov. 9, 2018 (<https://www.nytimes.com/2018/11/09/technology/facebook-arbitration-harassment.html>); Nitasha Tiku, “Tech Workers Unite to Fight Forced Arbitration,” *Wired*, Jan. 14, 2019 (<https://www.wired.com/story/tech-workers-unite-fight-forced-arbitration/>)

<sup>9</sup> Sarah Staszak, “Google Workers Want to Outlaw Mandatory Arbitration. Here’s Why This Matters,” *The Washington Post*, May 3, 2019 (<https://www.washingtonpost.com/politics/2019/05/03/google-workers-want-outlaw-mandatory-arbitration-heres-why-this-matters/>)

<sup>10</sup> See Jacqueline Thomsen, “Urges Lawmakers to Pass Bill Ending Arbitration for Sexual Harassment Claims,” *The Hill*, May 16, 2019 (<https://thehill.com/blogs/in-the-know/in-the-know/444032-gretchen-carlson-urges-lawmakers-to-pass-bill-ending-arbitration-for-sexual>)

<sup>11</sup> E.g., Erica Gonzalez, “The *Bombshell* Cast Looks Just Like Their Real-Life Counterparts,” *Harper’s Bazaar*, Dec. 13, 2019 (<https://www.harpersbazaar.com/culture/film-tv/a28775438/bombshell-movie-cast-vs-real-life/>)

<sup>12</sup> <https://www.sho.com/the-loudest-voice/cast/gretchen-carlson>

<sup>13</sup> Gretchen Carlson, “Fox News: I Want My Voice Back,” *The New York Times*, Dec. 12, 2019 (<https://www.nytimes.com/2019/12/12/opinion/gretchen-carlson-bombshell-movie.html>)

discrimination.<sup>14</sup> Many law firms, including Kirkland & Ellis and Sidley Austin, have abandoned the practice under pressure.<sup>15</sup> A non-exhaustive list of articles about mandatory arbitration outside the sexual harassment context appears in Exhibit A.

The public debate has spurred responses by policy makers. In the past several years, many bills have been introduced in Congress on the subject of mandatory arbitration, one of which passed the House in late 2019:

- Forced Arbitration Injustice Repeal Act (116<sup>th</sup> Congress H.R. 1423, S. 610): would prohibit pre-dispute arbitration agreements that require arbitration of employment, consumer, antitrust, or civil rights disputes.<sup>16</sup> FAIR passed the House in September 2019.<sup>17</sup>
- Restoring Justice for Workers Act (116<sup>th</sup> Congress H.R. 2749, S. 1491): would prohibit pre-dispute arbitration agreements involving employment-related claims.<sup>18</sup>
- Arbitration Fairness Act (115<sup>th</sup> Congress H.R.1374, S.537 and S.2591): would invalidate a pre-dispute agreement to arbitrate various kinds of claims, including employment and civil rights.<sup>19</sup>
- Restoring Statutory Rights and Interests of the States Act (115<sup>th</sup> Congress H.R.1396, S.550): would provide that a written agreement to arbitrate a violation of federal or state law must is not valid if entered into before the claim has arisen.<sup>20</sup>
- Ending Forced Arbitration of Sexual Harassment Act (115<sup>th</sup> Congress H.R.4570, S.2203): would invalidate a pre-dispute written agreement to arbitrate a claim arising out of conduct that would form the basis for a violation of the Civil Rights Act of 1964 based on sex, regardless of whether such a violation is alleged.<sup>21</sup>

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<sup>14</sup> Sejal Singh & Andre Manuel, “Harvard Law Students Are Taking on Forced Arbitration,” *The Nation*, Apr. 15, 2019 (<https://www.thenation.com/article/archive/harvard-law-students-are-taking-on-forced-arbitration/>); <https://www.peoplesparity.org/lgbtqlawstudents/>

<sup>15</sup> <https://www.peoplesparity.org/lgbtqlawstudents/>; <https://abovethelaw.com/2019/11/law-school-students-are-boycotting-gibson-dunn/>; <https://abovethelaw.com/2019/09/another-elite-law-firm-kicks-mandatory-arbitration-to-the-curb/>

<sup>16</sup> <https://www.congress.gov/bill/116th-congress/house-bill/1423>

<sup>17</sup> <https://www.vox.com/identities/2019/9/20/20872195/forced-mandatory-arbitration-bill-fair-act>

<sup>18</sup> <https://www.congress.gov/bill/116th-congress/house-bill/2749>

<sup>19</sup> <https://www.congress.gov/bill/115th-congress/house-bill/1374>;

<https://www.congress.gov/bill/115th-congress/senate-bill/537>;

<https://www.govtrack.us/congress/bills/115/s2591/text>;

[https://www.govtrack.us/congress/bills/115/s550?utm\\_campaign=govtrack\\_feed&utm\\_source=govtrack/feed&utm\\_medium=rss](https://www.govtrack.us/congress/bills/115/s550?utm_campaign=govtrack_feed&utm_source=govtrack/feed&utm_medium=rss)

<sup>20</sup> <https://www.congress.gov/bill/115th-congress/house-bill/1396/text?format=txt&r=46>

<sup>21</sup> <https://www.congress.gov/bill/115th-congress/house-bill/4570>;

<https://www.congress.gov/bill/115th-congress/senate-bill/2203/text?format=txt>

- Mandatory Arbitration Transparency Act (115<sup>th</sup> Congress H.R.4130, S.647): would prohibit a pre-dispute arbitration agreement from including a confidentiality provision regarding various kinds of claims, including employment, if that provision would violate a whistleblower statute or prevent disclosure of tortious or unlawful conduct, or issues of public policy or concern<sup>22</sup>

Fifty-six attorneys general of all 50 states, the District of Columbia and U.S. territories sent a letter to Congressional leadership in 2018 urging them to “free [victims of sexual harassment] from the injustice of forced arbitration and secrecy when it comes to seeking redress for egregious misconduct condemned by all concerned Americans.”<sup>23</sup>

State legislatures have also taken action on mandatory arbitration of employment-related claims. Most notably, in September 2019, California enacted a law requiring that an employee agree “voluntarily and affirmatively” to enter into an agreement to arbitrate employment-related claims and prohibiting retaliation against an employee who declines.<sup>24</sup>

Five other states have adopted measures to bar employers from requiring employees to agree to certain kinds of claims.<sup>25</sup> In 2018, the state of Washington passed a law invalidating any provision of an employment agreement that (a) requires the employee to waive her right to “publicly pursue” a discrimination claim or file a complaint with the “appropriate state or federal agencies” or (b) requires an employee to resolve a discrimination claim in a “dispute resolution process that is confidential.”<sup>26</sup> Vermont and Maryland have also barred pre-dispute agreements to arbitrate sexual harassment claims.<sup>27</sup> New Jersey’s statute, enacted in March 2019, went even further than the others, banning not only mandatory arbitration of claims for employment discrimination, retaliation and harassment, but also many nondisclosure agreements.<sup>28</sup> (New York enacted a law in fall 2018 barring pre-

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<sup>22</sup> <https://www.congress.gov/bill/115th-congress/house-bill/4130/text>;  
<https://www.congress.gov/bill/115th-congress/senate-bill/647>

<sup>23</sup> [http://myfloridalegal.com/webfiles.nsf/WF/HFIS-AVWMYN/\\$file/NAAG+letter+to+Congress+Sexual+Harassment+Mandatory+Arbitration.pdf](http://myfloridalegal.com/webfiles.nsf/WF/HFIS-AVWMYN/$file/NAAG+letter+to+Congress+Sexual+Harassment+Mandatory+Arbitration.pdf)

<sup>24</sup> <https://www.natlawreview.com/article/california-governor-signs-legislation-outlawing-mandatory-arbitration-agreements>

<sup>25</sup> Susan Kay Leader & Jenna Nalchajian, “Insight: The Brightening Spotlight on Mandatory Arbitration Clauses,” Bloomberg Law, Aug. 24, 2018 (<https://www.bna.com/insight-brightening-spotlight-n73014481979/>).

<sup>26</sup> <http://lawfilesexet.leg.wa.gov/biennium/2017-18/Pdf/Bills/Session%20Laws/Senate/6313-S.SL.pdf#page=1>

<sup>27</sup> <https://onlabor.org/can-states-ban-mandatory-arbitration-of-harassment-cases/>

<sup>28</sup> <https://www.daypitney.com/insights/publications/2019/03/19-nj-first-state-ban-employers-using-arbitration>

dispute arbitration agreements for sexual harassment claims,<sup>29</sup> and later other discrimination claims,<sup>30</sup> but a federal court in New York has ruled that the statute is preempted by federal law.<sup>31</sup>)

The Proposal's subject, mandatory arbitration of employment-related claims such as discrimination and harassment, is a consistent topic of widespread public debate as the Staff has interpreted that standard. Media attention has been substantial, and legislative initiatives are ongoing on both the state and federal level. Organized efforts are confronting private employers, many of whom have changed their practices as a result. Thus, though the Proposal addresses the workforce, the issue it raises transcends ordinary business operations.

### The Proposal Seeks Information at a High Level and Would Not Micromanage Walmart

Walmart argues that the Proposal would micromanage it because “the Proposal seeks to dictate both the contents of the report and the manner in which the Company evaluates any use of contractual provisions regarding mandatory arbitration of employment-related claims.”<sup>32</sup> Walmart urges that “it appears that the Proponent’s ultimate goal is not merely to seek enhanced disclosure of the issues identified in the Proposal, but also to discourage and limit, if not curtail, any possible use of contractual provisions requiring arbitration of employment-related claims in all or certain circumstances.”<sup>33</sup>

However, the Proposal does not ask Walmart to change its practices, only to report on them. Walmart does not explain how reporting on a practice would lead inexorably to limiting it; accordingly, shareholders voting on the Proposal would not be “substituting [their] judgment for that of management” on whether to use mandatory arbitration provisions.<sup>34</sup>

The Proposal does not seek so much detail that it micromanages. The Proposal asks for general information about the use of mandatory arbitration, including the proportion of the workforce covered and intentions in light of

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<sup>29</sup> [https://www.seyfarth.com/publications/MA102518-LE?utm\\_source=Mondaq&utm\\_medium=syndication&utm\\_campaign=View-Original](https://www.seyfarth.com/publications/MA102518-LE?utm_source=Mondaq&utm_medium=syndication&utm_campaign=View-Original)

<sup>30</sup> <https://www.americanbar.org/groups/litigation/committees/alternative-dispute-resolution/practice/2019/new-york-law-prohibiting-arbitration-of-sexual-harassment-claims-is-preempted/>

<sup>31</sup> See <https://www.theemployerreport.com/2019/07/ny-ban-on-mandatory-arbitration-of-sexual-harassment-claims-overturned/>

<sup>32</sup> No-Action Request, at 11.

<sup>33</sup> No-Action Request, at 12.

<sup>34</sup> See No-Action Request, at 10.

California's new law. Thus, it does not seek the kind of "intricate detail" the Commission spoke of when describing micromanagement in the 1998 Release.<sup>35</sup>

In that way, the Proposal differs from those in the determinations Walmart cites. For example, the proposal in Marriott International Inc.<sup>36</sup> not only asked the company to install low-flow showerheads in its hotels, but also included technical specifications and identified the kinds of information Marriott should collect to judge the showerheads' impact. In SeaWorld Entertainment, Inc.<sup>37</sup> the proposal urged the company to eliminate live orca exhibits and instructed the company what to put in their stead. Last season, Amazon<sup>38</sup> successfully argued that a proposal asking it to conduct human rights due diligence on three high-risk food products and disclose the results to shareholders micromanaged because of its specificity.

A micromanagement argument similar to Walmart's was rejected in CBRE Group.<sup>39</sup> Like Yum, CBRE argued that many factors go into its decisions whether to use mandatory arbitration provisions, including the legal and regulatory environment, and that shareholders would not be in a position to make an informed judgment. The Staff declined to concur in CBRE's view.

The Proposal does not try to substitute shareholders' judgment for that of management on the appropriateness of using mandatory arbitration provisions in particular situations, recognizing that such specific decisions are the responsibility of management. The Proposal asks Walmart to provide general information on its use of such provisions and does not seek detailed data. Shareholders would be well-positioned to understand information disclosed pursuant to the Proposal, as it would closely resemble the types of disclosures companies make about other risks facing the business. Accordingly, exclusion on micromanagement grounds would be inappropriate.

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For the reasons set forth above, Walmart has not satisfied its burden of showing that it is entitled to omit the Proposal in reliance on Rule 14a-8(i)(7). We thus respectfully request that Walmart's request for relief be denied.

CtW appreciates the opportunity to be of assistance in this matter. If you have any questions or need additional information, please contact me at (\_\_\_\_) \_\_\_\_-\_\_\_\_.

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<sup>35</sup> Exchange Act Rel. No. 40018 (May 21, 1998).

<sup>36</sup> Marriott International Inc. (Mar. 17, 2010).

<sup>37</sup> SeaWorld Entertainment, Inc. (Mar. 30, 2017).

<sup>38</sup> Amazon.com Inc. (Oxfam) (Apr. 3, 2019).

<sup>39</sup> CBRE Group, Inc. (Mar. 6, 2019).

Sincerely,

A handwritten signature in blue ink, appearing to read "Dieter Waizenegger". The signature is fluid and cursive, with a prominent initial "D" and a stylized "W".

Dieter Waizenegger  
Executive Director

cc: Kristopher A. Isham, Senior Counsel  
Kristopher.Isham@walmartlegal.com

## Appendix A

Coverage of mandatory arbitration of sexual harassment or assault claims:

- Corky Siemaszko, “Kamala Harris Responds to Alleged Sex Assault at Her Husband’s Law Firm,” NCBnews.com, Oct. 8, 2019 (<https://www.nbcnews.com/politics/politics-news/kamala-harris-forced-address-alleged-sex-assault-husband-s-law-n1063321>)
- Allison Levitsky, “Which Silicon Valley Companies Force Workers to Give Up Their Right to Sue Over Sexual Harassment,” Silicon Valley Business Journal, Sept. 19, 2019 (<https://www.bizjournals.com/sanjose/news/2019/09/19/force-the-issue-forced-arbitration-shannon-coulter.html>)
- Kerri Anne Renzulli, “Workers at Google, Facebook, eBay and Airbnb Can Now Sue Over Sexual Harassment—Here’s What That Means for Employees,” CNBC.com, Nov. 19, 2018 (<https://www.cnbc.com/2018/11/19/google-facebook-airbnb-employees-can-now-sue-over-sexual-harassment.html>)(reporting four tech firms “ending the controversial legal practice” of requiring employees to take claims to arbitration)
- Daisuke Wakabayashi & Jessica Silver-Greenberg, “Facebook to Drop Forced Arbitration in Harassment Cases,” The New York Times, Nov. 9, 2018 (<https://www.nytimes.com/2018/11/09/technology/facebook-arbitration-harassment.html>)
- Terri Gerstein, “End Forced Arbitration for Sexual Harassment. Then Do More,” The New York Times, Nov. 14, 2018 (<https://www.nytimes.com/2018/11/14/opinion/arbitration-google-facebook-employment.html>)
- Gerrit De Vynck et al., “Google Curbs Forced Arbitration After Protest on Harassment,” Bloomberg, Nov. 8, 2018 (<https://www.bloomberg.com/news/articles/2018-11-08/google-changes-policies-on-sexual-misconduct-after-staff-walkout>)
- Susan Antilla, “Google and Facebook Ended Mandatory Arbitration for Sexual Harassment Claims. Will Workers Outside the Tech Industry Benefit?” The Intercept, Nov. 21, 2018 (<https://theintercept.com/2018/11/21/google-sexual-harassment-arbitration/>)
- Marie Solis, “Hollywood’s Time’s Up Campaign Still Must Defeat Forced Arbitration, a Sexual Harasser’s ‘Best Friend,’” Newsweek, Jan. 2, 2018 (<https://www.newsweek.com/hollywoods-times-campaign-forced-arbitration-non-disclosure-agreements-768539>)
- Jing Cao, “Microsoft Eliminates Arbitration in Sexual Harassment Cases,” Bloomberg, Dec. 19, 2017 (<https://www.bloomberg.com/news/articles/2017-12-19/microsoft-eliminates-arbitration-in-sexual-harassment-cases>)

- Rachel Gillette, “More Than Half of American Workers Wouldn’t be Able to Take Their Sexual Harassment Claims to Court,” *Business Insider*, Nov. 30, 2017 (<https://www.businessinsider.com/mandatory-arbitration-clause-sexual-harassment-claims-2017-11>)
- Madison Malone Kircher, “Airbnb and Ebay Follow Google’s Example, Change Sexual-Harassment Policies,” *New York*, Nov. 13, 2018 (<https://nymag.com/intelligencer/2018/11/tech-companies-end-forced-arbitration-after-google-does.html>)
- Emily Stewart, “Uber and Lyft Are Getting Rid of Tactics That Keep Sexual Assault Victims Silent,” *Vox*, May 15, 2018 (<https://www.vox.com/technology/2018/5/15/17355702/uber-driver-arbitration-nondisclosure-sexual-harassment-assault>)
- Nitasha Tiku, “Big Tech Eyes Supreme Court’s Employee-Arbitration Case,” *Wired*, Oct. 2, 2017 (<https://www.wired.com/story/big-tech-eyes-supreme-courts-employee-arbitration-case/>)
- Nitasha Tiku, “Tech Workers Unite to Fight Forced Arbitration,” *Wired*, Jan. 14, 2019 (<https://www.wired.com/story/tech-workers-unite-fight-forced-arbitration/>)
- Sam Levin, “Susan Fowler’s Plan After Uber? Tear Down the System That Protects Harassers,” *The Guardian*, Apr. 11, 2018 (<https://www.theguardian.com/technology/2018/apr/11/susan-fowler-uber-interview-forced-arbitration-law>)
- Gretchen Carlson, “How Arbitration Clauses Allow Sexual Harassment to Continue,” *Time*, Mar. 10, 2017 (<http://time.com/4698538/gretchen-carlson-sexual-harassment-arbitration-clauses/>)
- Jena McGregor, “Google and Facebook ended Forced Arbitration for Sexual Harassment Claims. Why More Companies Could Follow,” *The Washington Post*, Nov. 12, 2018 ([https://www.washingtonpost.com/business/2018/11/12/google-facebook-ended-forced-arbitration-sex-harassment-claims-why-more-companies-could-follow/?utm\\_term=.1a3502b08fa6](https://www.washingtonpost.com/business/2018/11/12/google-facebook-ended-forced-arbitration-sex-harassment-claims-why-more-companies-could-follow/?utm_term=.1a3502b08fa6))
- Kate Clark, “Airbnb Ends Forced Arbitration Days After Google, Facebook Did the Same,” *TechCrunch*, Nov. 12, 2018 (<https://techcrunch.com/2018/11/12/airbnb-ends-forced-arbitration-days-after-google-facebook-did-the-same/>)
- Michelle Cheng, “Google Workers Launch Social Media Campaign to Pressure Employers to Drop Forced Arbitration,” *Inc.*, Jan. 24, 2019 (<https://www.inc.com/michelle-cheng/google-employees-social-media-campaign-protest-forced-arbitration.html>)

Coverage of mandatory arbitration of employment-related claims other than sexual harassment or assault:

- Dan Eaton, “New Law Adds Obstacle to Arbitration Agreements,” The San Diego Union-Tribune, Nov. 11, 2019 (<https://www.sandiegouniontribune.com/business/story/2019-11-11/new-law-adds-obstacle-to-arbitration-agreements>)
- Sejal Singh & Andre Manuel, “Harvard Law Students Are Taking on Forced Arbitration,” The Nation, Apr. 15, 2019 (<https://www.thenation.com/article/archive/harvard-law-students-are-taking-on-forced-arbitration/>)
- Andrew Keshner, “Congress Could Rewrite the Rules on Forced Arbitration—3 Reasons Every American Should Care,” MarketWatch, Sept. 27, 2019 (<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>)
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February 3, 2020

VIA E-MAIL to [shareholderproposals@sec.gov](mailto:shareholderproposals@sec.gov)

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

Re: *Walmart Inc.*  
*Shareholder Proposal of CtW Investment Group*  
*Securities Exchange Act of 1934—Rule 14a-8*

Ladies and Gentlemen:

This letter is to inform you that Walmart Inc. (the “Company”) intends to omit from its proxy statement and form of proxy for its 2020 Annual Shareholders’ Meeting (collectively, the “2020 Proxy Materials”) a shareholder proposal and statement in support thereof (the “Proposal”) received from CtW Investment Group (the “Proponent”).

Pursuant to Rule 14a-8(j), we have:

- filed this letter with the Securities and Exchange Commission (the “Commission”) no later than eighty (80) calendar days before the Company intends to file its definitive 2020 Proxy Materials with the Commission; and
- concurrently sent a copy of this correspondence to the Proponent.

Rule 14a-8(k) and Staff Legal Bulletin No. 14D (Nov. 7, 2008) (“SLB 14D”) provide that shareholder proponents are required to send companies a copy of any correspondence that the proponents elect to submit to the Commission or the staff of the Division of Corporation Finance (the “Staff”). Accordingly, we are taking this opportunity to inform the Proponent that if the Proponent elects to submit additional correspondence to the Commission or the Staff with respect to this Proposal, a copy of that correspondence should be furnished concurrently to the undersigned on behalf of the Company pursuant to Rule 14a-8(k) and SLB 14D.

## THE PROPOSAL

The Proposal states:

RESOLVED that shareholders of Walmart Inc. (“Walmart”) 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 Walmart to arbitrate employment-related claims. The report should specify the proportion of the workforce subject to such provisions and any changes in policy or practice Walmart has made, or intends to make, as a result of California’s ban on agreeing to arbitration as a condition of employment.

A copy of the Proposal, as well as related correspondence with the Proponent, is attached to this letter as Exhibit A.

## BASES FOR EXCLUSION

We hereby 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 (1) deals with matters relating to the Company’s ordinary business operations and (2) micromanages the Company by seeking to impose specific methods for implementing complex policies related to the Company’s operations.

## 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**

#### *A. Background On Rule 14a-8(i)(7)*

Rule 14a-8(i)(7) permits a company to omit from its proxy materials a shareholder proposal that relates to the company’s “ordinary business” operations. According to the Commission’s release accompanying the 1998 amendments to Rule 14a-8, the term “ordinary business” “refers to matters that are not necessarily ‘ordinary’ in the common meaning of the word,” but instead 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 (May 21, 1998) (the “1998 Release”).

In the 1998 Release, the Commission stated that the underlying policy of the ordinary business exclusion 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,” and identified two central considerations that underlie this policy. The first consideration is that “[c]ertain 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 the tasks cited by the

Commission 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.* The second consideration is related 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 (Nov. 22, 1976)). The Proposal implicates both considerations set forth in the 1998 Release.

The 1998 Release further distinguishes proposals pertaining to ordinary business matters from those involving “significant social policy issues.” 1998 Release (citing Exchange Act Release No. 12999 (Nov. 22, 1976)). While “proposals . . . focusing on sufficiently significant social policy issues (*e.g.*, significant discrimination matters) generally would not be considered excludable,” the Staff has indicated that proposals relating to both ordinary business matters and significant social policy issues may be excludable in their entirety in reliance on Rule 14a-8(i)(7) if they do not “transcend the day-to-day business matters” discussed in the proposals. 1998 Release. In this regard, when assessing proposals under Rule 14a-8(i)(7), the Staff considers “both the proposal and the supporting statement as a whole.” *See* Staff Legal Bulletin No. 14C, part D.2 (June 28, 2005).

A shareholder proposal being framed in the form of a request for a report does not change the nature of the proposal. The Commission has stated 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 (Aug. 16, 1983). In addition, 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.* (avail. Oct. 26, 1999).

*B. The Proposal Is Excludable Because It Relates To The Ordinary Business Matter Of Managing The Company’s Workforce*

The Company helps people around the world save money and live better – anytime and anywhere – by providing the opportunity to shop in retail stores and through eCommerce. It has an expansive international footprint, with more than 2.2 million associates working in more than 11,300 stores operating across 27 countries.<sup>1</sup> The Proposal implicates contractual provisions for arbitrating employment-related claims across the Company’s extensive, global workforce, and its broadly stated request would require the Company to report on actions, contracts, policies, claims, and issues that fall squarely within categories that have consistently been deemed excludable under Rule 14a-8(i)(7) as ordinary business matters. Specifically, the Proposal seeks a report “on the use of contractual provisions requiring employees of [the Company] to arbitrate employment-related claims,” including quantifiable metrics regarding the Company’s use of such provisions, as well as whether the Company intends to change its policy or practice on

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<sup>1</sup> *See* the Company’s Annual Report on Form 10-K for the fiscal year ended January 31, 2019, available at [https://s2.q4cdn.com/056532643/files/doc\\_financials/2019/annual/Walmart-2019-AR-Final.pdf](https://s2.q4cdn.com/056532643/files/doc_financials/2019/annual/Walmart-2019-AR-Final.pdf).

arbitration as a result of certain legislation in California. Through its discussion of these matters, the Proposal focuses on how the Company engages with its employees around the world, including its terms and conditions of employment and how it handles related disputes, all of which are core components of managing a large workforce on a day-to-day basis across the numerous jurisdictions and countries in which the Company operates.

The Commission and Staff have long held that a shareholder proposal may be excluded under Rule 14a-8(i)(7) if it, like the Proposal, relates to a company's management of its workforce. Notably, in *United Technologies Corp.* (avail. Feb. 19, 1993), the Staff provided the following examples of excludable ordinary business categories: "employee health benefits, general compensation issues not focused on senior executives, management of the workplace, employee supervision, labor-management relations, *employee hiring and firing, conditions of the employment* and employee training and motivation" (emphasis added). Importantly, the Commission subsequently recognized in the 1998 Release that "management of the workforce" is "fundamental to management's ability to run a company on a day-to-day basis."

Consistent with the 1998 Release, the Staff has recognized that a wide variety of proposals relating to the management of a company's workforce are excludable under Rule 14a-8(i)(7). For example, in *Merck & Co., Inc.* (avail. Mar. 7, 2002), the proposal requested that the company maintain a database to keep shareholders informed on certain research and development matters and the appointment of a council "to be in charge of reviewing disputes regarding filling R&D positions, inventorship, scientific priorities and ethical conduct." The Staff concurred with exclusion of the proposal as "relating to [the company's] ordinary business operations (*i.e.*, management of the workforce)." *See also Apple, Inc.* (avail. Dec. 20, 2019, *recon. denied* Jan. 17, 2020) (concurring with the exclusion of a proposal requesting a "report detailing the potential risks associated with omitting 'viewpoint' and 'ideology' from its written equal employment opportunity (EEO) policy" as "not transcend[ing] the [c]ompany's ordinary business operations"); *Walmart, Inc.* (avail. Apr. 8, 2019) (concurring with the exclusion of a proposal requesting "that the board prepare a report to evaluate the risk of discrimination that may result from the Company's policies and practices for hourly workers taking absences from work for personal or family illness" as relating to management of the Company's workforce); *Costco Wholesale Corp.* (avail. Nov. 14, 2014, *recon. denied* Jan. 5, 2015) (concurring with the exclusion of a proposal requesting adoption of a company-wide code of conduct including an anti-discrimination policy that protects employees' right to engage in political and civic activities as "relating to [the company's] ordinary business operations" and, in particular, "policies concerning [the company's] employees"); *Donaldson Company, Inc.* (avail. Sept. 13, 2006) (concurring with the exclusion of a proposal requesting the establishment of "appropriate ethical standards related to employee relations" as relating to the company's "ordinary business operations (*i.e.*, management of the workforce)"); and *Intel Corp.* (avail. Mar. 18, 1999) (concurring with the exclusion of a proposal seeking adoption of an "Employee Bill of Rights" that would have established various "protections" for the company's employees, including limited work-hour requirements, relaxed starting times, and a requirement that employees treat one another with dignity and respect, as "relating, in part, to [the company's] ordinary business operations (*i.e.*, management of the workforce)"). Like the above-cited precedent, the Proposal,

in seeking a report “on the use of contractual provisions requiring employees of [the Company] to arbitrate employment-related claims,” relates to the Company’s management of its workforce, including terms of employment and how it manages relations with employees.

Additionally, the Staff has consistently concurred with the exclusion under Rule 14a-8(i)(7) of proposals concerning hiring or terminating employees as relating to management of a company’s workforce and, therefore, the company’s ordinary business operations. *See, e.g., HP Inc.* (avail. Dec. 20, 2019) (concurring with the exclusion of a proposal seeking a report on “the reduction in profit for FY19 of maintaining core R&D and Quality headcount and budgets at the levels from the end of 19Q3” where the company argued that the proposal’s principal thrust related to decision-making with respect to, among other things, the management of the company’s workforce “[b]y requesting both a report on what the reduction in profits would have been if certain headcount levels were maintained, and an evaluation of risk ‘due to cuts in personnel’”); *Merck & Co., Inc.* (avail. Mar. 6, 2015) (concurring with the exclusion of a proposal relating to the source of candidates considered for company positions because “the proposal relate[d] to procedures for hiring and promoting employees”); *Starwood Hotels & Resorts Worldwide, Inc.* (avail. Feb. 14, 2012) (concurring with the 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”); *Berkshire Hathaway Inc.* (avail. Jan. 31, 2012) (concurring with the exclusion of a proposal mandating the dismissal of employees who engaged in behavior that would create a conflict of interest, constitute cause for dismissal, or violate certain other principles specified in the proposal because it related “to procedures for terminating employees”); *Wells Fargo & Co.* (avail. Feb. 22, 2008) (concurring with the exclusion of a proposal requesting a policy stating that the company would not employ individuals who worked at a credit rating agency within the last year because it related to “the termination, hiring, or promotion of employees”); and *Consolidated Edison, Inc.* (avail. Feb. 24, 2005) (concurring with the exclusion of a proposal requesting the termination of certain supervisors because it related to “the termination, hiring, or promotion of employees”). Similarly, the Proposal, which relates to the Company’s decisions about whether to use certain contractual provisions in agreements with its employees, relates specifically to how the Company manages its workforce in numerous jurisdictions and countries, including the terms and conditions of employment and procedures for handling certain disputes in each such jurisdiction, and is therefore likewise excludable under Rule 14a-8(i)(7).

Notably, the Staff recently concurred with the exclusion under Rule 14a-8(i)(7) of proposals relating to the use of certain employment practices, including agreements providing for mandatory arbitration of employment-related claims, as relating to the management of a company’s workforce. In *Amazon.com, Inc.* (avail. Mar. 6, 2019) (“*Amazon (CtW)*”), the Staff concurred with the exclusion of a proposal requesting the adoption of a policy not to engage in any “Inequitable Employment Practice,” which the proposal defined as “*mandatory arbitration of employment-related claims; non-compete agreements with employees; agreements with other companies not to recruit each others’ employees; and [certain] non-disclosure agreements*” (emphasis added). In concurring with exclusion, the Staff stated that the proposal “relates generally to the [c]ompany’s policies concerning its employees, and does not focus on an issue

that transcends ordinary business matters.” *See also XPO Logistics, Inc.* (avail. Mar. 6, 2019) (same); and *Yum! Brands, Inc.* (avail. Mar. 6, 2019) (same).

Like the proposal in *Amazon (CtW)*, the Proposal focuses on the Company’s policies and practices regarding certain contractual provisions with its employees generally. The Proposal requests that the Company “report to shareholders . . . on the use of contractual provisions requiring employees of [the Company] to arbitrate employment-related claims.” The Proponent further clarifies the purpose of the Proposal by stating, “[t]he information sought in this Proposal would allow shareholders to assess the risks posed by the use of mandatory arbitration of employment-related claims.” By focusing on the Company’s use of certain employment practices, specifically its decisions of whether or not to enter into certain contractual arrangements with certain of its employees that provide for mandatory arbitration of employment-related claims, the Proposal, like in *Amazon (CtW)*, broadly focuses on the Company’s policies concerning its employees, including its procedures for hiring employees and day-to-day decisions regarding certain terms and conditions of employment. A company’s use of standard contractual agreements with its employees is both lawful and a practice commonly used by many companies. Consistent with the foregoing precedent, the Proposal is properly excludable as relating to the Company’s ordinary business.

The Company’s decisions regarding whether or not to use employment-related arbitration provisions involve considerations that are fundamental to the management of the Company’s business, such as the costs and duration of arbitration as compared to litigation, the differing legal regimes in the various jurisdictions where employees of the Company may work (including every state in the United States and the 26 other countries in which the Company conducts retail operations), and other potential benefits and drawbacks of arbitration and litigation in each such jurisdiction. Most shareholders do not have an understanding of these factors and the related Company-specific effects across the millions of employees who are employed in a wide range of positions across the globe. It would therefore be impractical to communicate this information to shareholders to the extent necessary for them to be able to make informed decisions regarding this aspect of the Company’s management of its workforce.

As articulated in the Company’s Global Statement of Ethics, the Company is committed to treating all employees fairly, with courtesy and respect, and the Company has policies in place that protect employees from unlawful discrimination and harassment.<sup>2</sup> Many companies routinely use the lawful contractual practices noted in the Proposal. The Company’s decisions regarding management of its workforce, including whether and on what terms to enter into contractual arrangements with employees (including whether and if such arrangements contain provisions requiring arbitration of claims that may occur) are quintessential ordinary business decisions. These decisions are complex and based on factors that extend well beyond the expertise of shareholders. Thus, consistent with the cited precedent, the Proposal is concerned

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<sup>2</sup> *See* the Company’s Global Statement of Ethics, *available at* [https://www.walmartethics.com/content/dam/walmartethics/documents/statement\\_of\\_ethics/Walmart\\_Statement\\_of\\_Ethics\\_English.pdf](https://www.walmartethics.com/content/dam/walmartethics/documents/statement_of_ethics/Walmart_Statement_of_Ethics_English.pdf), at page 11.

with the Company's employment policies and practices and the management of its workforce, and it is therefore excludable under Rule 14a-8(i)(7).

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

The well-established precedent set forth above demonstrates that the Proposal addresses ordinary business matters and, therefore, is excludable under Rule 14a-8(i)(7). As drafted, the resolved clause of the Proposal seeks a report "on the use of contractual provisions requiring employees of [the Company] to arbitrate employment-related claims," thereby implicating any and all employment-related claims, including torts, defamation, compensation, unfair competition, and retaliation, among others, across the Company's extensive, global workforce. Even if portions of the Proposal's supporting statements also touch upon a possible significant policy issue by mentioning the topics of discrimination, sexual harassment, and wage theft as part of the broad category of employment-related claims captured by the Proposal's request, the Proposal is nonetheless excludable under Rule 14a-8(i)(7) because it fails to sufficiently focus on any significant policy issue.

The Commission stated in the 1998 Release that proposals "focusing on sufficiently significant social policy issues (e.g., significant discrimination matters) generally would not be considered to be excludable." Relatedly, the Staff has frequently concurred that a proposal which touches, or may touch, upon significant policy issues is nonetheless excludable if the proposal does not focus on such issues. For example, in *PetSmart, Inc.* (avail. Mar. 24, 2011), the proposal requested that the board require its suppliers to certify they had not violated "the Animal Welfare Act, the Lacey Act, or any state law equivalents," the principal purpose of which related to preventing animal cruelty. In concurring with the company's request for exclusion under Rule 14a-8(i)(7), the Staff stated, "[a]lthough the humane treatment of animals is a significant policy issue, we note your view that the scope of the laws covered by the proposal is 'fairly broad in nature from serious violations such as animal abuse to violations of administrative matters such as record keeping.'"

In addition, the Staff has specifically concurred with the exclusion of proposals that touched upon significant policy issues within the context of management of a company's workforce. *See, e.g., JPMorgan Chase & Co.* (avail. Mar. 9, 2015) (concurring with the exclusion of a proposal requesting the company amend its human rights-related policies "to address the right to take part in one's own government free from retribution" because the proposal related to the company's "policies concerning its employees"); *CVS Health Corp.* (avail. Feb. 27, 2015) (concurring with the exclusion of a proposal requesting the company to "amend its equal employment opportunity policy . . . to explicitly prohibit discrimination based on political ideology, affiliation or activity," as relating to the company's "policies concerning its employees"); *The Walt Disney Co.* (avail. Nov. 24, 2014, *recon. denied* Jan. 5, 2015) (concurring with the exclusion of a proposal requesting that the company "consider the possibility of adopting anti-discrimination principles that protect employees' human right[s]" relating to engaging in political and civic expression without retaliation in the workplace, as relating to the company's "policies concerning its employees"); *Bank of America Corp.* (avail. Feb. 14, 2012) (concurring with the

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”); and *Apache Corp.* (avail. Mar. 5, 2008) (concurring with the exclusion of a proposal requesting the implementation of equal employment opportunity policies based on certain principles and noting that “some of the principles relate to [the company’s] ordinary business operations”). Thus, it is clear that even those proposals that touch upon discrimination or retaliation are nonetheless properly excludable as matters related to the company’s ordinary business.

Notably, the Staff recently concurred with the exclusion of proposals relating to the use of certain employment practices, including the use of mandatory arbitration provisions as a means of addressing employment-related claims, even though the proposals raised concerns regarding discrimination and sexual harassment. See *Amazon (CtW)*; *XPO Logistics*; and *Yum! Brands*. For example, in *Amazon (CtW)*, the proposal included several references that indicated the Proponent’s concerns with sexual harassment and, to a lesser degree, wage theft, but such references alone were insufficient to transform the proposal into one that transcended ordinary business matters because the language of the resolved clause was not narrowly tailored and failed to focus on such concerns. Like the proposal in *Amazon (CtW)*, here the Proposal is similarly overbroad. Additionally, the significant overlap in language used in the supporting statements of both proposals warrants similar treatment. In this regard, both the Proposal and the proposal in *Amazon (CtW)*:

- state that recent “high-profile sexual harassment cases involving Fox News” and Uber “highlighted the impact” of arbitration clauses;
- reference a “bill to end mandatory arbitration of sexual harassment claims” introduced in Congress (and since passed), as well as the “56 state and territorial attorneys general” who supported it;
- indicate there was “robust public debate [related to the use of certain employment practices], including responses by legislators, regulators and state attorneys general;”
- state that “[m]andatory 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;” and
- state that certain contractual agreements “can allow a toxic culture to flourish, increasing the severity of eventual consequences and harming employee morale.”

Like in *Amazon (CtW)*, these same references to discrimination, sexual harassment, and wage theft in the Proposal should not preclude relief where the resolved clause broadly applies to the Company’s decisions whether or not to use mandatory arbitration of employee-related claims (not limited to claims of harassment or discrimination but rather capturing any and all employee claims). Consistent with the Staff’s views in *Amazon (CtW)*, the Staff has not previously

recognized mandatory arbitration with employees, generally, to be an issue that transcends ordinary business, absent a particular focus on a significant policy issue.

Given the similarity of the Proposal to that of *Amazon (CtW)*, the Proposal should be entitled to the same relief. Here, the resolved clause makes no mention of discrimination or sexual harassment. Instead, the Proposal sweepingly relates to any and all employment-related arbitration claims and necessarily entails a report and review of (1) any contractual provisions requiring arbitration across the Company's workforce, (2) the proportion of the workforce that may be impacted by such provisions, and (3) any changes in policy or practice the Company intends to make as a result of California's ban on arbitration (which is not limited to sexual harassment or discrimination claims). Thus, although there is language in the Proposal that references sexual harassment and workplace discrimination, the actual request of the Proposal is not narrowly tailored to those ends, and the Proposal is therefore properly excludable as relating to the Company's ordinary business operations.

The Company is aware that in *CBRE Group, Inc.* (avail. Mar. 6, 2019) the Staff did not concur with the exclusion of a proposal requesting a report "on the impact of mandatory arbitration policies on the [c]ompany's employees" that "evaluate[s] the risks that may result from the [c]ompany's current mandatory arbitration policy on claims of sexual harassment." The remainder of the proposal also focused squarely on mandatory arbitration as it related to the topic of sexual harassment. Accordingly, because the proposal in *CBRE Group* focused on the issue of sexual harassment in the workplace, the Staff noted that the proposal "transcend[ed] ordinary business matters." Unlike in *CBRE Group*, the Proposal is not limited to a review of and report on the extent of the Company's use of mandatory arbitration provisions tied exclusively to sexual harassment. Instead, the Proposal is fatally overbroad such that exclusion is warranted because it necessarily entails a review of and report on any and all contractual provisions requiring arbitration of employment-related claims, which, as noted above, includes a range of topics (*e.g.*, torts, defamation, compensation, unfair competition, and retaliation, among others). By not specifically focusing on sexual harassment in its request, the Proposal is more analogous to the proposal in *Amazon (CtW)* than *CBRE Group*, and it therefore should be entitled to the same relief.

Since the actual language of the Proposal is overly inclusive, and clearly applies to the arbitration of any and all employment-related claims, including claims pertaining to non-discriminatory and insignificant matters, the Proposal is properly excludable under Rule 14a-8(i)(7) as relating to the Company's ordinary business and, particularly, the Company's employee relations and management of its workforce.

*D. The Proposal May Be Excluded Under Rule 14a-8(i)(7) Because It Seeks To Micromanage The Company*

As noted above, the Commission stated in the 1998 Release that one of the considerations underlying the ordinary business exclusion is "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."

The 1998 Release further states that “[t]his consideration may come into play in a number of circumstances, such as where the proposal involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies.” In Staff Legal Bulletin No. 14J (Oct. 23, 2018), the Staff explained that “[u]nlike the first consideration [of the ordinary business exclusion], which looks to a proposal’s subject matter, the second consideration looks only to the degree to which a proposal seeks to micromanage. Thus, a proposal that may not be excludable under the first consideration may be excludable under the second if it micromanages the company.”

More recently, in Staff Legal Bulletin No. 14K (Oct. 16, 2019), the Staff further clarified that “a proposal, regardless of its precatory nature, that prescribes specific timeframes or methods for implementing complex policies . . . may be viewed as micromanaging the company.” Moreover, “the precatory nature of a proposal does not bear on the degree to which a proposal micromanages.” *Id.* Instead, the Staff assesses the “level of prescriptiveness of the proposal,” and “if the method or strategy for implementing the action requested by the proposal is overly prescriptive, thereby potentially limiting the judgment and discretion of the board and management, the proposal may be viewed as micromanaging the company.” *Id.*

The Staff has consistently permitted exclusion of shareholder proposals that attempt to micromanage a company by substituting shareholder judgment for that of management with respect to complex day-to-day business operations. For example, in *General Electric Co.* (avail. Mar. 5, 2019), the proposal requested a board committee to direct an outside firm to “undertake a thorough review of any compensation, including supplementary pension impacts, paid or credited to the 25 most highly compensated executives in any given year for the period of 2014 through 2017 to determine if that level of compensation was warranted for each individual” and “what means and methods of recoupment might be available to [s]hareowners.” The proposal further requested that information on the foregoing “be set forth in the 2019 Annual Report to Shareowners,” including decisions of the committee regarding “which executives, if any, should be affected, in what manner, and to what extent.” The Staff concurred that the proposal could be excluded under Rule 14a-8(i)(7) based on micromanagement, noting “the [p]roposal would, among other things, dictate the scope of executives and time period to be covered by the review, direct a board committee to make individualized decisions with respect to the level and potential recoupment of the executives’ compensation, and detail the manner of disclosing the specifics of those decisions.” *See also Amazon.com, Inc. (Oxfam America, Inc.)* (avail. Apr. 3, 2019) (concurring with the exclusion of a proposal requesting that the company prepare human rights impact assessments for at least three food products sold by the company presenting a high risk of adverse human rights impacts because the proposal sought “to impose specific methods for implementing complex policies in place of the ongoing judgments of management as overseen by its board of directors”); *Abbott Laboratories (Oxfam America, Inc.)* (avail. Feb. 28, 2019) (concurring with the exclusion of a proposal that would “micromanage[] the [c]ompany because, among other things, the [p]roposal would require the compensation committee to approve each sale by a senior executive during a buyback and [would require] the [c]ompany to include explanatory disclosure in the proxy statement describing how the committee concluded that approving the

sale was in the [c]ompany’s long-term best interest”); *Johnson & Johnson* (avail. Feb. 14, 2019) (concurring with the exclusion of a proposal requesting the adoption of a policy prohibiting adjustments of financial performance metrics that would exclude legal or compliance costs when determining the amount or vesting of any senior executive incentive compensation award as “micromanag[ing] the [c]ompany by seeking to impose specific methods for implementing complex policies”); *SeaWorld Entertainment, Inc.* (avail. Mar. 30, 2017, *recon. denied* Apr. 17, 2017) (concurring with the exclusion of a proposal requesting the replacement of live orca exhibits with virtual reality experiences as “seek[ing] to micromanage 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”); and *Marriott International, Inc.* (avail. Mar. 17, 2010, *recon. denied* Apr. 19, 2010) (concurring with the exclusion of a proposal requiring the use of “specific technologies,” namely the installation of low-flow showerheads, at certain of the company’s hotels because “although the proposal raises concerns with global warming, the proposal seeks to micromanage the company to such a degree that exclusion of the proposal is appropriate”).

As in the precedent cited above, the Proposal micromanages the Company by prescribing how the Company should assess and report on its possible use of mandatory arbitration provisions. In this regard, the Proposal seeks to dictate both the contents of the report and the manner in which the Company evaluates any use of contractual provisions requiring mandatory arbitration of employment-related claims. The requested report captures all employment-related arbitration claims, including those that may be immaterial, without regard to their substance or nature, and requires that the Company specify “the proportion of the workforce subject to such provisions,” which necessarily entails a comprehensive review of any contractual arrangements with the Company’s extensive, global workforce of more than 2.2 million employees across each state in the U.S., as well as each of the international countries in which the Company operates. Further, the Proposal stipulates that the report should specify “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.” The Company has stores in every state in the United States, including California, and in many other countries, yet the Proposal requires that the Company evaluate its policies based on legislation of one specific state, the legality of which is unclear.<sup>3</sup>

The Proposal leaves no room for management to consider a different method for addressing and reporting on its decisions of whether or not to use mandatory arbitration provisions, including the extent to which the Company may have already considered such practices, or whether it may be more beneficial to focus on legislation in other states or foreign jurisdictions or certain kinds of employment-related claims that the Company finds significant, rather than assessing every employment arrangement that might require mandatory arbitration for purposes of preparing the requested report. Moreover, based on the language and tone of the Proposal,

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<sup>3</sup> See, e.g., Daniel Wiessner, *Judge blocks California law banning mandatory arbitration from taking effect*, REUTERS, WESTLAW NEWS (Jan. 2, 2020), <https://www.reuters.com/article/employment-california/judge-blocks-california-law-banning-mandatory-arbitration-from-taking-effect-idUSL1N2970AY>.

taken as a whole, it appears that the Proponent's ultimate goal is not merely to seek enhanced disclosure of the issues identified in the Proposal, but also to discourage and limit, if not curtail, any possible use of contractual provisions requiring arbitration of employment-related claims in all or certain circumstances. To this end, the Proposal asserts that the use of mandatory arbitration for employment-related claims "can allow a toxic culture to flourish" and may "harm[] employee morale." As such, the Proposal is overly prescriptive in seeking to stipulate how, when, and on what terms the Company should or should not enter into certain contractual arrangements with its employees, including how it determines to resolve any potential claims with employees (*i.e.*, whether through litigation, arbitration, or other means).

Based on the requested elements described in the Proposal, it is of the same prescriptive nature as those proposals discussed above that the Staff concurred were excludable based on the degree to which they impermissibly micromanaged the company. Therefore, consistent with the precedent cited above, because the Proposal seeks to impose specific methods for implementing complex policies as a substitute for the judgment of management, the Proposal may be excluded pursuant to Rule 14a-8(i)(7) because it attempts to micromanage the Company.

### CONCLUSION

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

We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Please provide any correspondence regarding this matter to me at [Kristopher.Isham@walmartlegal.com](mailto:Kristopher.Isham@walmartlegal.com). If we can be of any further assistance in this matter, please do not hesitate to call me at (479) 204-8684, or Elizabeth A. Ising of Gibson, Dunn & Crutcher LLP at (202) 955-8287.

Sincerely,



Kristopher A. Isham  
Senior Counsel  
Walmart Inc.

Enclosures

cc: Elizabeth A. Ising, Gibson, Dunn & Crutcher LLP  
Richard Clayton, CtW Investment Group

**EXHIBIT A**

# CtW Investment Group

December 20, 2019

Gordon Y. Allison

Senior Vice President, Office of the Corporate Secretary, Chief Counsel for Finance and Corporate Governance

Walmart Inc.

702 Southwest 8th Street

Bentonville, Arkansas 72716-0215

Dear Mr. Allison,

We hereby submit the enclosed shareholder proposal (“Proposal”) for inclusion in Walmart Inc.’s (“Company”) proxy statement to be circulated to Company shareholders in conjunction with the next annual meeting of shareholders. The Proposal is submitted under Rule 14(a)-8 (Proposals of Security Holders) of the U.S. Securities and Exchange Commission’s proxy regulations.

CtW is the beneficial owner of approximately 38 shares of the Company’s common stock, which been held continuously for more than a year prior to this date of submission. The Proposal requests that the Board prepare a report for shareholders on the use of contractual provisions requiring employees of the Company to arbitrate employment-related claims, and to describe any changes in policy that the Company plans to make in the wake of recent legislative changes in California.

CtW intends to hold the shares through the date of the Company’s next annual meeting of shareholders. The record holder of the stock will provide the appropriate verification of the Fund’s beneficial ownership by separate letter. Either the undersigned or a designated representative will present the Proposal for consideration at the annual meeting of shareholders.

If you have any questions or wish to discuss the Proposal, please contact Richard Clayton, Director of Research, at (202) 721-6038 or [richard.clayton@ctwinvestmentgroup.com](mailto:richard.clayton@ctwinvestmentgroup.com). Copies of correspondence or a request for a “no-action” letter should be forwarded to Mr. Clayton in care of the CtW Investment Group, 1900 L St. NW, Suite 900, Washington, DC 20036.

Sincerely,



Dieter Waizenegger

Executive Director, CtW Investment Group

RESOLVED that shareholders of Walmart Inc. (“Walmart”) 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 Walmart to arbitrate employment-related claims. The report should specify the proportion of the workforce subject to such provisions and any changes in policy or practice Walmart 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. A 2017 study examining EEOC data from 2005-2015 found that retail was the second most-common industry for sexual harassment charges, of those designating an industry.<sup>1</sup> Wage theft from low-wage employees is widespread; it has been estimated to cost low-wage workers in three large U.S. cities \$3 billion per year.<sup>2</sup> A 2017 report based on court records found that Walmart compelled arbitration with respect to at least some employee claims.<sup>3</sup>

A bill to end mandatory arbitration of sexual harassment claims 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.<sup>4</sup> 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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<sup>1</sup> <https://www.americanprogress.org/issues/women/news/2017/11/20/443139/not-just-rich-famous/>

<sup>2</sup> See [https://www.supremecourt.gov/opinions/17pdf/16-285\\_q811.pdf#page=32](https://www.supremecourt.gov/opinions/17pdf/16-285_q811.pdf#page=32), Dissent, at 26-27.

<sup>3</sup> <http://employeeightsadvocacy.org/wp-content/uploads/2017/09/Insitute-2017-Report-Widespread-Use-Of-Workplace-Arbitration.pdf>

<sup>4</sup> <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 risks posed by the use of mandatory arbitration of employment-related claims. We urge shareholders to vote for this Proposal.



**HOWARD N. HANDWERKER**

First Vice President

OFFICE (626) 432-9907

CELL (626) 437-4819

howardhandwerker@amalgamatedbank.com

December 20, 2019

Gordon Y. Allison  
Chief Counsel for Finance and Corporate Governance  
Walmart Inc.  
702 Southwest 8<sup>th</sup> Street  
Bentonville, Arkansas 72716-0215

Dear Mr. Allison,

Please be advised that Amalgamated Bank holds 38 shares of Walmart Inc. ("Company") common stock beneficially for the CTW Investment Group (CTW), the proponent of a shareholder proposal submitted to the Company on December 20, 2019, in accordance with Rule 14(a)-8 of the Securities and Exchange Act of 1934. CTW has continuously held at least \$2,000.00 worth of the Company's common stock for more than one year prior to submission of the resolution and plans to continue ownership through the date of your 2020 annual meeting.

Amalgamated Bank serves as custodian and record holder for CTW through its nominee, CEDE & Co. The shares are held by Amalgamated Bank through DTC Account #2352.

Sincerely,

A handwritten signature in black ink, appearing to read "Howard N. Handwerker".