February 25, 2020

By e-mail: shareholderproposals@sec.gov

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

Re: Response to Dollar Tree, Inc.’s January 28, 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 Tree, Inc. (“Dollar Tree” or the “Company”), dated January 28, 2020, informing the staff of the Office of Chief Counsel of the Division of Corporate Finance (“Staff”) that the Company intends to omit the Systems’ shareholder proposal (“Proposal”) from its 2020 proxy materials (the “No-Action Request”). Dollar Tree has not met its burden of establishing that the Proposal may be excluded as pertaining to ordinary business operations under Rule 14a-8(i)(7). The subject matter of the Proposal—the use of contractual provisions requiring employees to arbitrate employment-related claims—has itself recently emerged as a significant policy issue that transcends Dollar Tree’s ordinary business operations, and the report requested by the Proposal in no way micromanages the Company. Accordingly, the Proposal cannot be excluded under Rule 14a-8(i)(7). The Systems respectfully request that the Staff deny the No-Action Request.

The Proposal and Supporting Statement

The Proposal states:

“RESOLVED that shareholders of Dollar Tree, Inc. (“Dollar Tree”) 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

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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 Tree has attached the Proposal and Supporting Statement, as submitted to the Company, as Exhibit A to the No-Action Request.
Dollar Tree 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 Tree 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 Tree. Contractual provisions requiring employees to arbitrate employment-related claims—which Dollar Tree 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.”

The Analytical Framework

A. The Ordinary Business Exclusion under Rule 14a-8(i)(7)

The “ordinary business” exception permits a company to exclude a proposal that “deals with a matter relating to the company’s ordinary business operations.” The applicability of this exception rests on two central considerations: (1) the “proposal’s subject matter,” and (2) “the degree to which the proposal ‘micromanages’ the company.”

With respect to subject matter, 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.” 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.” 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.” In determining whether a policy issue has become “sufficiently significant,” the Staff examines “the proposal and the supporting statement as a whole,” and determines whether there is “widespread public debate regarding [the] issue.” The subject matter of a proposal can become a significant policy

3 Rule 14a-(8)(i)(7).
7 SLB 14K at § B.2. (quoting the 1998 Release).
8 Staff Legal Bulletin 14C at § D.
9 SLB 14A.
issue in just a matter of months. 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.” 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.” 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).”

With respect to micromanagement, the analysis “rests on an evaluation of the manner in which a proposal seeks to address the subject matter raised, rather than the subject matter itself.” Thus, “two proposals focusing on the same subject matter may warrant different outcomes based solely on the level of prescriptiveness with which the proposals approach that subject matter.” A proposal is overly prescriptive where it “supplant[s] the judgment of management and the board” by “seek[ing] intricate detail or impos[ing] a specific strategy, method, action, outcome or timeline for addressing an issue.” In contrast, where a proposal is “framed as a request that the company consider, discuss the feasibility of, or evaluate the potential for a particular issue” it generally will “not be viewed as micromanaging matters of a complex nature.”

**The Proposal Focuses on a Significant Policy Issue for Dollar Tree that Transcends Ordinary Business**

Dollar Tree contends that the Proposal is excludable under Rule 14a-8(i)(7) because it relates to the management of the Company’s 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 by companies to require their employees to arbitrate their employment-related claims, it is precisely the pervasive use of this device by Dollar Tree 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 this device 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 Tree is an employer of over 182,000 people and acknowledges that its mandatory arbitration policy applies company-wide, the subject

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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 Id. at § B.4.
15 Id.
16 Id.
17 Id.
matter of this Proposal presents a policy issue that is significant for Dollar Tree. The Proposal is, therefore, not excludable under Rule 14a-8(i)(7).

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

Dollar Tree first argues that the Proposal should be excluded on ordinary business grounds because it “focuses on how the Company engages with its employees, 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.”18 The Systems do not dispute that the Staff has previously concurred with the exclusion of proposals that concern subjects focused on the nuts and bolts of workforce management, such as maintaining an employee database,19 the scope of a company’s equal employment opportunity policy,20 leave of absence policies,21 revisions to a company’s code of conduct,22 directing and auditing management to assure compliance with company standards,23 the adoption of an employee bill of rights,24 reporting on the impact of specific corporate actions on company profits,25 procedures for hiring and promoting employees,26 procedures for hiring and training employees,27 a company’s policy concerning the hiring of persons previously employed in a particular industry,28 and the termination of excess personnel supervisors.29 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.”30 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.’”31 In light of the widespread public debate concerning the pervasive use by companies of contractual provisions requiring the arbitration of employment-related claims—and the direct relevance of this debate to the Company (both of which we discuss below)—the use of these arbitration provisions has become a significant policy issue in general and for the Company in particular. The Systems thus have a right for the Proposal to be included in the Company’s proxy materials.

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18 No-Action Request at 4.
19 Merck & Co., Inc. (Mar. 7, 2002).
21 Wal-Mart, Inc. (Apr. 8, 2019).
24 Intel Corp. (Mar. 18, 1999).
25 HP Inc. (Dec. 20, 2019).
26 Merck & Co., Inc. (Mar. 6, 2015).
28 Wells Fargo & Co. (Feb. 22, 2008)
29 Consolidated Edison, Inc. (Feb. 24, 2005).
30 SLB 14A.
B. Dollar Tree has not Demonstrated that the Proposal Fails to Focus on a Significant Policy Issue that Transcends the Company’s Ordinary Business Operations

Dollar Tree next contends that the Proposal should be excluded because it fails to focus on any significant policy issue. 32 Although Dollar Tree discusses several previous no-action determinations to support its contention, only four of these—CBRE Group, Inc. (Mar. 6, 2019), Amazon.com, Inc. (Mar. 6, 2019), Yum! Brands, Inc. (Mar. 6, 2019) and XPO Logistics, Inc. (Mar. 6, 2019)—address proposals that concern a company’s use of mandatory arbitration provisions. Accordingly, only these four 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.”

Amazon.com, Inc., Yum! Brands, Inc. and XPO Logistics, Inc. all 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 all three, 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 four 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 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 sufficiently significant policy issue that transcends ordinary business operations. 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., Yum! Brands, Inc. and XPO Logistics, Inc.), or because the focus on mandatory arbitration was itself further linked to the risks created by the use of such provisions in connection with sexual harassment claims. Likewise, it is not clear from Amazon.com, Inc., Yum! Brands, Inc. and XPO Logistics, 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 policies that presented only ordinary business concerns, 33 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., Yum! Brands, Inc. and XPO Logistics, Inc. in March 2019, further

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32 No-Action Request at 8-11.
33 As Dollar Tree emphasizes, the Staff has previously found proposals excludable where a proposal implicates both a significant policy issue and ordinary business matters. See No-Action Request at 9.
developments in the past year 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.” 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.” As set forth below, there is more than sufficient evidence for the Staff to now 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.”

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 some of the reasons why this issue has attracted so much recent public attention and debate.

First, employees who are subject to these provisions are generally barred from having their employment-related claims heard in court. For example, Dollar Tree’s “Mutual Agreement to Arbitrate Claims” requires the “arbitration of all claims or controversies … past, present or future, that can be raised under applicable federal, state, or local-law, arising out of or related to [the employee’s] employment (or its termination), that Dollar Tree may have against Associate or that the Associate may have against … (1) Dollar Tree, [and] (2) its officers, directors, employees, or agents in any capacity ….” The list of claims specifically identified as being

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34 1998 Release at § III.
35 Id.
37 A copy of Dollar Tree’s Mutual Agreement to Arbitrate Claims (For Associates Hired Before October 6, 2014), which was filed with the United States District Court for the Southern District of California in Espino v. Dollar Tree
subject to arbitration is expansive and includes “claims for: overtime, misclassification as to exempt status, breaks, meal periods, expense reimbursement, pay for bank runs, off the clock work, wages, or other compensation; work conditions, including seating; breach of contract or covenant (express or implied); torts (including without limitation defamation either during or after employment with Dollar Tree); wrongful termination; retaliation or discrimination (including, but not limited to, race, sex, sexual orientation, religion, national origin, age, marital status, physical or mental disability or handicap, or medical condition); benefits …; intellectual property, confidential information, or trade secrets; or violation of any federal, state, local, or other governmental law, statute, rule, regulation, or ordinance ….”

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.”

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.” 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.” 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.” Dollar Tree itself has successfully compelled the arbitration of sexual harassment claims.

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.” 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 Tree’s employee arbitration agreement bars class and collective actions. Dollar Tree is not alone in this practice though, as it

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39 Id.
40 Id. at 3.
41 Id. at 4.
42 Id. at 6.
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.”\(^\text{45}\)

*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%.\(^\text{46}\) For employers with over 5,000 employees—such as Dollar Tree—over 67% now require their employees to arbitrate their employment-related claims.\(^\text{47}\)

*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.”\(^\text{48}\)

*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.”\(^\text{49}\) 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:

- 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


\(^{46}\) *Id.* at 1.

\(^{47}\) *Id.* at 6.

\(^{48}\) *Id.*

\(^{49}\) *Id.* at 10.
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.”

- Joe Biden: “Sixty million workers have been forced to sign contracts waiving their rights to sue their employer and nearly 25 million have been forced to waive their right to bring class action lawsuits or joint arbitration. These contracts require employees to use individual, private arbitrations when their employer violates federal and state laws. Biden will enact legislation to ban employers from requiring their employees to agree to mandatory individual arbitration and forcing employees to relinquish their right to class action lawsuits or collective litigation, as called for in the PRO Act.”

- 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.”

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

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,

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faster resolution, and reduced burden on the judiciary. By limiting contractual options, this bill would hurt businesses and the very consumers 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.”

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 the past year. On April 2, 2019, the Senate Judiciary Committee held a hearing entitled “Arbitration in America,” 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.” 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). 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. On September 27, 2019, the House voted 225 to 186 to pass the FAIR Act and it is currently pending in the Senate.

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. A year later, in February 2019, Illinois Representative Cheri Bustos, with bipartisan sponsorship, introduced the Ending

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Forced Arbitration of Sexual Harassment Act of 2019, which would prohibit pre-dispute arbitration agreements from being valid or enforceable if they required arbitration of a sexual discrimination claim.\textsuperscript{61}

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.”\textsuperscript{62} The enactment of this law attracted significant national attention.\textsuperscript{63}

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.\textsuperscript{64} 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.\textsuperscript{65}

Maryland, New Jersey and Vermont have also passed legislation targeted at the use of mandatory arbitration in the employment context.66

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:

Scott McCleskey, “Mandatory arbitration is bad policy and bad for business,”
Reuter's (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

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

John Bowden, “Wells Fargo announces end to mandatory arbitration for
employee sexual assault claims,” The Hill (Feb. 13, 2020), available at
https://thehill.com/policy/finance/483014-wells-fargo-announces-end-to-
mandatory-arbitration-for-employee-sexual-assault

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
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),

- 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_5cfa7c1a4b045133e6057a1


• Legal and Academic Research

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

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.”67 Here, Dollar Tree’s company-wide use of contractual provisions requiring employees to arbitrate employment-related claims demonstrates that the significant policy issue concerning the use of such provisions is also significant for the Company.

The No-Action Request states that the Company has approximately 182,000 employees and operates in 48 states.68 In October 2014, Dollar Tree implemented a company-wide arbitration program.69 Those hired before the roll-out were given the option to opt-out; those hired after the roll-out were required to agree to mandatory arbitration.70 Given these facts, it is likely that the vast majority of the Company’s 182,000 employees are now forced to individually arbitrate any employment-related claim covered by the Company’s arbitration agreement.

It also appears that Dollar Tree is the subject of numerous arbitrations commenced by employees. Dollar Tree’s 10-Q for the period ended November 2, 2019 indicates that the Company is subject to “several thousand allegedly individual claims in arbitration,” which includes 2, 100 wage and hour claims filed recently.71 Dollar Tree’s mandatory arbitration practices has also attracted negative public attention. One recent article, for example, described

67 SLB 14K at § B.2.
68 No-Action Request at 4.
70 Id.
some of the recent large fines Dollar Tree has received from the Occupational Safety and Health Administration and noted that Dollar Tree’s employees are asked to waive their right to sue in court and instead submit to arbitration.\(^{72}\)

Given that Dollar Tree’s employee arbitration agreement likely applies to the vast majority of its employees, and the public debate concerning the use of arbitration in the employment context, Dollar Tree’s continued use of contractual provisions requiring employees to arbitrate employment-related claims presents a significant policy issue for the Company that transcends its ordinary business.

### The Proposal Does Not Micromanage Dollar Tree

Finally, Dollar Tree argues that the Proposal is excludable because it seeks to micromanage the Company.\(^{73}\) This argument is without merit. Where a proposal asks for a report, it may only be excluded on micromanagement grounds if the requested report is “intricately detailed” or “relates to the imposition or assumption of specific timeframes or methods for implementing complex policies,”\(^{74}\) or “supplant[s] the judgment of management and the board” by “seek[ing] intricate detail or impos[ing] a specific strategy, method, action, outcome or timeline for addressing an issue.”\(^{75}\) Where a proposal is “framed as a request that the company consider, discuss the feasibility of, or evaluate the potential for a particular issue” it generally will “not be viewed as micromanaging matters of a complex nature.”\(^{76}\)

Here, there is nothing “intricately detailed” about the report requested by the Proposal. The Proposal simply urges the Company’s board to provide a report that specifies (1) “the proportion of the workforce subject to [provisions requiring employees to arbitrate employment-
related claims].” (2) “the number of employment-related arbitration claims initiated and decided in favor of the employee, in each case in the previous calendar year,” and (3) “any changes in policy or practice Dollar Tree has made, or intends to make, as a result of California’s ban on agreeing to arbitration as a condition of employment.” This is all general, high-level data and information concerning the Company’s use of mandatory arbitration provisions.

There is also no “imposition or assumption of any specific timeframe” on the Company in connection with the production of the requested report. Likewise, there is no method imposed for the implementation of a complex policy. In fact, the Proposal makes no policy recommendations to the Company at all. The Proposal also does not supplant the judgment of management or the board because it seeks only general, high-level data—not intricate granular detail—concerning the Company’s use of contractual provisions and it does not impose any method, action or outcome that the Company must use or take in addressing its use of mandatory arbitration provisions—for the simple reason that it makes no recommendations at all concerning the use of such provisions.

Nevertheless, Dollar Tree argues that the Proposal “dictate[s] both the contents of the report and the manner in which the Company evaluates its use of contractual provisions requiring mandatory arbitration of employment-related claims.” While the Proposal does request that the report include certain limited factual content about the company’s use of mandatory arbitration provisions, it does not dictate the full contents of any such report and the Company remains free to add additional information to the requested report. The Staff has found that a request for a report that sought purely factual information on “actually incurred company costs and associated/significant benefits accruing to shareholders, public health and the environment from [a company’s] environment-related activities that are voluntary and exceed federal/state regulatory requirements” did not micromanage the company. Similarly, the Staff found that a proposal seeking a report containing detailed information concerning “payments … used for direct lobbying and grassroots lobbying communications, including the amount of the payment and recipient” that identified, for each payment, the persons in the company who participated in making the decision to make the contributions or expenditures, did not micromanage the company. The factual information sought in these two proposals, which were both found to not micromanage the companies at issue, far exceeds that sought in the Proposal.

Dollar Tree also mistakenly contends that the Proposal “leaves no room for management to consider a different method for addressing and reporting on its use of mandatory arbitration provisions, including the extent to which the Company has already considered such practices, or whether it may be more beneficial to focus on legislation in other states or certain kinds of employment-related claims that the Company finds significant, rather than reporting on and assessing every employment-related claim that is subject to arbitration.” The fact that the Proposal seeks certain information does not mean that it “leaves no room” for the Company to address and report on its use of mandatory arbitration provisions in other ways as well. All that is urged is that the report at least include the requested information concerning the three general topics identified.

77 No-Action Request at 13.
78 Duke Energy Corp. (Mar. 12, 2019).
79 Raytheon Company (Mar. 29, 2011).
Finally, Dollar Tree argues that the Proposal is “overly prescriptive” because “it appears that the Proponents’ 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, the Company’s use of contractual provisions requiring arbitration of employment-related claims in all or certain circumstances.”80 This is pure speculation and not a recognized consideration for the Staff. Neither the Proposal nor the Supporting Statement sets forth an “ultimate goal” advanced by the Systems. As the Supporting Statement makes clear, the information requested by the Proposal is being sought to “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.”

For these reasons, Dollar Tree has not shown that the Proposal micromanages the Company.

Conclusion

For the reasons set forth above, Dollar Tree 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 Tree’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: shareholderproposals@gibsondunn.com
Eising@gibsondunn.com

80 No-Action Request at 13-14.
January 28, 2020

**VIA E-MAIL**

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

Re:  *Dollar Tree, Inc.  
Shareholder Proposal of the New York City Employees’ Retirement System et al.  
Securities Exchange Act of 1934—Rule 14a-8*

Ladies and Gentlemen:

This letter is to inform you that our client, Dollar Tree, Inc. (the “Company”), intends to omit from its proxy statement and form of proxy for its 2020 Annual Meeting of Shareholders (collectively, the “2020 Proxy Materials”) a shareholder proposal and statement in support thereof (the “Proposal”) received from the Office of 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 “Proponents”).

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 copies of this correspondence to the Proponents.

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 Proponents that if the Proponents elect 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 Dollar Tree, Inc. (“Dollar Tree”) 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 Tree 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 Tree 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 Proponents, is attached to this letter as Exhibit A.

BASES FOR EXCLUSION

For the reasons discussed below, we believe that the Proposal may be excluded from the 2020 Proxy Materials pursuant to Rule 14a-8(i)(7) because the Proposal (i) deals with matters relating to the Company’s ordinary business operations and (ii) 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 Involves 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...

In the 1998 Release, the Commission stated that the central 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 “[w]here 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 is a leading operator of discount variety stores. It has an expansive North American footprint, with approximately 182,000 associates working in more than 15,000 stores operating across 48 states and five Canadian provinces. The Proposal implicates the Company’s existing arbitration policy, which applies Company-wide to all levels of the Company’s extensive workforce, from executive officers to part-time seasonal workers, and provides for mandatory arbitration of employment-related claims. 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 and all employment-related arbitration claims, as well as whether the Company intends to change its policy or practice on 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, 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.

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

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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 transcending the [company’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)”.

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 relates to the Company’s comprehensive arbitration program and its standard, Company-wide use of arbitration agreements, which it enters into with all new employee hires. Notably, the Company’s mandatory arbitration policy provides mutual benefits to both employees and the Company, and the Company as well as its employees are bound by the terms of such policy to resolve employment-related disputes through arbitration. Accordingly, as in the above-cited precedent, the Proposal relates specifically to how the Company manages its workforce, including the terms and conditions of employment and procedures for handling all disputes with its employees, and is therefore likewise excludable under Rule 14a-8(i)(7).

Importantly, 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 use of 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 Proponents further clarify the purpose of the Proposal by stating, “[t]he 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.” By focusing on the Company’s use of certain employment practices, specifically its choice to enter into contractual arrangements with its employees that provide for mandatory arbitration of employment-related claims, which are mutually binding on both the Company and its employees, the Proposal, like in *Amazon (CtW)*, broadly focuses on the Company’s policies concerning its employees, including its procedures for hiring employees, certain terms and conditions of employment, and Company-wide policies concerning how to handle disputes with employees. The Company’s use of routine, contractual agreements with its employees at all levels across the Company’s workforce 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 the use of 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 whether the enforceability of any relevant arbitration-related legislation in such jurisdictions may be the subject of pending litigation), and other potential benefits and drawbacks of arbitration and litigation. Most shareholders do not have an understanding of these factors and the related Company-specific effects across the tens of thousands of employees who are employed in a wide range of positions across the United States and Canada. 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 Code of Ethics, the Company is, among other things, “committed to treating all [employees] fairly, with dignity and respect,” does “not tolerate discrimination,” and is “committed to complying with all applicable state and federal wage and hour laws.”2 The Company has policies and practices in place that protect employees from unlawful discrimination and harassment and violations of wage, hour, and other

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employment laws, and it communicates to employees where and how they can raise any related concerns and report violations of the Company’s Code of Ethics. Although a few jurisdictions have recently adopted legislation related to the use of mandatory arbitration of employment-related claims, the legality of some of these provisions is unclear. Moreover, 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 (e.g., whether 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 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).


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. Even if the Proposal also touches 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.” Relatively, 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,”

3 Id.
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 use of 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 (i) all contractual provisions requiring arbitration across the Company’s workforce, (ii) the proportion of the workforce impacted by such provisions, (iii) granular metrics regarding the number of such claims initiated and decided in favor of the employee (not limited to the topic of sexual harassment or discrimination), and (iv) 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 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 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 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 its use of contractual provisions requiring mandatory arbitration of employment-related claims. The requested report captures all arbitration claims, including those that may be immaterial, without regard to their substance or nature, and then requires meticulous itemization and reporting of each and every employment-related arbitration claim in the previous calendar year that was (i) initiated and (ii) decided in favor of the employee. 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 almost every state in the United States, including California, yet the Proposal requires that the Company evaluate its policies based on legislation of one specific state. The Proposal leaves no room for management to consider a different method for addressing and reporting on its use of mandatory arbitration provisions, including the extent to which the Company has already considered such practices, or whether it may be more beneficial to focus on legislation in other states or certain kinds of employment-related claims that the Company finds significant, rather than reporting on and assessing every employment-related claim that is subject to arbitration. Moreover, based on the language and tone of the Proposal, taken as a whole, it appears that the Proponents’ 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, the Company’s 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 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, the Company intends to exclude the Proposal from its 2020 Proxy Materials, and we respectfully request that the Staff concur that the Proposal may be excluded under Rule 14a-8.

We would be happy to provide you with any additional information and answer any questions that you may have regarding this subject. Correspondence regarding this letter should be sent to shareholderproposals@gibsondunn.com. If we can be of any further assistance in this matter, please do not hesitate to call me at (202) 955-8287 or William A. Old, Jr., the Company’s Chief Legal Officer, at (757) 321-5419.

Sincerely,

Elizabeth A. Ising

Enclosures

cc: William A. Old, Jr., Dollar Tree, Inc.
    Michael Garland, Office of the Comptroller of the City of New York
December 4, 2019

William A. Old Jr.
Corporate Secretary
Dollar Tree, Inc.
500 Volvo Parkway
Chesapeake, VA 23320

Dear Mr. Old Jr.:

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 Tree, Inc. 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 Tree, Inc. ("Dollar Tree") 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 Tree 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 Tree 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 Tree 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.

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.
December 4, 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 November 30, 2018 through today as noted below:

Security: DOLLAR TREE INC

Cusip: 256746108

Shares: 127,975

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

Sincerely,

Derek A. Farrell
Assistant Vice President

Information Classification: Limited Access
December 4, 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 November 30, 2018 through today as noted below:

Security: DOLLAR TREE INC
Cusip: 256746108
Shares: 1,812

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

Sincerely,

Derek A. Farrell
Assistant Vice President
December 4, 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 November 30, 2018 through today as noted below:

Security: DOLLAR TREE INC

Cusip: 256746108

Shares: 51,016

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

Sincerely,

Derek A. Farrell
Assistant Vice President
December 4, 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 November 30, 2018 through today as noted below:

Security: DOLLAR TREE INC

Cusip: 256746108

Shares: 165,059

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

Sincerely,

Derek A. Farrell
Assistant Vice President