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

DIVISION OF
CORPORATION FINANCE

March 16, 2017

Elizabeth A. Ising
Gibson, Dunn & Crutcher LLP
shareholderproposals@gibsondunn.com

Re: McDonald's Corporation
Incoming letter dated January 23, 2017

Dear Ms. Ising:

This is in response to your letters dated January 23, 2017 and March 2, 2017 concerning the shareholder proposal submitted to McDonald's by the Marco Consulting Group Trust I. We also have received a letter from the proponent dated February 13, 2017. Copies of all of the correspondence on which this response is based will be made available on our website at http://www.sec.gov/divisions/corpfin/cf-noaction/14a-8.shtml. For your reference, a brief discussion of the Division's informal procedures regarding shareholder proposals is also available at the same website address.

Sincerely,

Matt S. McNair
Senior Special Counsel

Enclosure

cc: Maureen O'Brien
Segal Marco Advisors
obrien@marcoconsulting.com

March 16, 2017

Response of the Office of Chief Counsel
Division of Corporation Finance

Re: McDonald's Corporation
Incoming letter dated January 23, 2017

The proposal requests that the board take the necessary steps to adopt a plan to give certain owners/operators of the company's restaurants the power to elect one new member of the board by issuing a new series of preferred stock whose holders are entitled to elect the new director.

We are unable to concur in your view that McDonald's may exclude the proposal under rule 14a-8(i)(2) or rule 14a-8(i)(6). Accordingly, we do not believe that McDonald's may omit the proposal from its proxy materials in reliance on rule 14a-8(i)(2) or 14a-8(i)(6).

We are unable to concur in your view that McDonald's may exclude the proposal under rule 14a-8(i)(7). Accordingly, we do not believe that McDonald's may omit the proposal from its proxy materials in reliance on rule 14a-8(i)(7).

Sincerely,

Evan S. Jacobson
Special Counsel

DIVISION OF CORPORATION FINANCE
INFORMAL PROCEDURES REGARDING SHAREHOLDER PROPOSALS

The Division of Corporation Finance believes that its responsibility with respect to matters arising under Rule 14a-8 [17 CFR 240.14a-8], as with other matters under the proxy rules, is to aid those who must comply with the rule by offering informal advice and suggestions and to determine, initially, whether or not it may be appropriate in a particular matter to recommend enforcement action to the Commission. In connection with a shareholder proposal under Rule 14a-8, the Division's staff considers the information furnished to it by the company in support of its intention to exclude the proposal from the company's proxy materials, as well as any information furnished by the proponent or the proponent's representative.

Although Rule 14a-8(k) does not require any communications from shareholders to the Commission's staff, the staff will always consider information concerning alleged violations of the statutes and rules administered by the Commission, including arguments as to whether or not activities proposed to be taken would violate the statute or rule involved. The receipt by the staff of such information, however, should not be construed as changing the staff's informal procedures and proxy review into a formal or adversarial procedure.

It is important to note that the staff's no-action responses to Rule 14a-8(j) submissions reflect only informal views. The determinations reached in these no-action letters do not and cannot adjudicate the merits of a company's position with respect to the proposal. Only a court such as a U.S. District Court can decide whether a company is obligated to include shareholder proposals in its proxy materials. Accordingly, a discretionary determination not to recommend or take Commission enforcement action does not preclude a proponent, or any shareholder of a company, from pursuing any rights he or she may have against the company in court, should the company's management omit the proposal from the company's proxy materials.

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March 2, 2017

VIA E-MAIL

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

Re: *McDonald's Corporation*
Supplemental Letter Regarding the Shareholder Proposal of The Marco Consulting Group Trust I
Securities Exchange Act of 1934—Rule 14a-8

Ladies and Gentlemen:

On January 23, 2017, McDonald's Corporation (the "Company") submitted a letter (the "No-Action Request") notifying the staff of the Division of Corporation Finance (the "Staff") of the Securities and Exchange Commission that the Company intends to omit from its proxy statement and form of proxy for its 2017 Annual Meeting of Shareholders (collectively, the "2017 Proxy Materials") a shareholder proposal (the "Proposal"), including statements in support thereof (the "Supporting Statement"), received from The Marco Consulting Group Trust I (the "Proponent").

The No-Action Request indicated our belief that the Proposal could be excluded from the 2017 Proxy Materials pursuant to: (1) Rule 14a-8(i)(7) because the Proposal deals with matters relating to the Company's ordinary business operations; (2) Rule 14a-8(i)(2) because the Proposal would cause the Company to violate Delaware law; and (3) Rule 14a-8(i)(6) because the Company lacks the power and authority to implement the Proposal. Subsequently, the Proponent submitted a letter dated February 13, 2017 responding to the No-Action Request (the "Response Letter"). We write to address the arguments raised in the Response Letter.

ANALYSIS

I. The Proposal May Be Excluded Under Rule 14a-8(i)(7) Because It Deals With Matters Related To The Company's Ordinary Business Operations.

A. The Proposal Relates To The Management Of The Company's Capital Structure, And, More Specifically, The Terms of Issuance of Stock, Which Is A Matter Related To The Company's Ordinary Business Operations.

The Response Letter argues that the Proposal is not excludable under Rule 14a-8(i)(7) as relating to the Company's ordinary business operations because "the Proposal's objective is a significant governance reform." We believe that the Response Letter mischaracterizes both Rule 14a-8(i)(7), including Staff precedent interpreting the Rule, and the Proposal.

Rule 14a-8(i)(7) permits the exclusion of a shareholder proposal that "deals with a matter relating to the company's ordinary business operations." As explained in the No-Action Request, the Staff has consistently concurred with the exclusion of shareholder proposals that relate to the management of a company's capital structure, including by dictating the terms of stock to be issued, because they involve a company's "ordinary business operations." Thus, the Response Letter's assertion about the "main thrust" of the Proposal is irrelevant because, as with the proposals in the Staff precedent excluded under Rule 14a-8(i)(7) (and its predecessor, Rule 14a-8(c)(7)) cited in the No-Action Request, the express language of the Proposal demonstrates that it relates to the management of the Company's capital structure, which is an ordinary business matter. In this regard, the Proposal specifically asks the Company to issue "a new series of preferred stock" (the "Franchisee Preferred Stock") and lists numerous specific features of this proposed class of stock. Thus, the Proposal is analogous to the proposal in *Bank of America Corp.* (avail. Jan. 10, 2011) that was excluded under Rule 14a-8(i)(7) because it requested shareholder approval for the authorization and issuance of common shares and thus related to "the management of a [c]orporation's capital structure."

Moreover, the Staff has consistently concurred with the exclusion under Rule 14a-8(i)(7) of shareholder proposals like the Proposal that seek corporate governance reforms in a manner that involves a company's ordinary business. For example, in *Citigroup, Inc.* (avail. Jan. 6, 2012), the Staff concurred with the exclusion of a proposal requesting the appointment of a director with specific skills who would communicate with shareholders by email in order to "represent[] the interest of the owners of the corporation (primarily the holders of common shares)." Even though the proposal addressed a "governance reform" similar to what the Response Letter asserts with respect to the Proposal, the proposal was excluded under Rule 14a-8(i)(7) because it addressed ordinary business matters. *See also Intel Corp.* (avail. Jan. 21, 2016) (concurring with the exclusion under Rule 14a-8(i)(7) of a proposal concerning the need for auditor rotation); *Naugatuck Valley Financial Corp.* (avail. Feb. 28, 2013) (concurring with the exclusion under Rule 14a-8(i)(7) of a proposal requiring more frequent board meetings); *Lucent Technologies, Inc.* (avail. Dec. 5, 2003) (concurring with the exclusion under Rule 14a-8(i)(7) of a proposal requesting that the board adopt a policy of allowing only independent directors to participate in recommending policies governing certain employee benefits where the supporting statement indicated that such "governance reform" would assure an appropriate level of independence in managing employee benefit plan assets); *American Electric Power Co.* (avail. Jan. 27, 2003) (concurring with the exclusion under Rule 14a-8(i)(7) of a proposal requesting that directors spend at least 20 hours per month to attend and prepare for monthly board meetings, despite the proponent's characterization of the proposal as "much needed Corporate governance reform" in a letter to the Staff).

Finally, we disagree with the Response Letter's characterization of the precedent cited in the No-Action Request as involving proposals in which "[t]he supporting statements made clear that the proponents were concerned *solely* with the impact of additional common stock issuances on shareholders" (emphasis added). For example, the proposal in *Consolidated Edison Co. of New York, Inc.* (avail. Mar. 8, 1983), which is discussed in the No-Action Request, called for shares of common stock to be issued to every customer who held an account for the previous ten consecutive years and to every employee who had achieved ten years of service and, like the Proposal, included several restrictions on the stock and the recipients of the stock. The proposal's focus on issuing shares to long-time customers and employees demonstrated that the proponent was not concerned "solely with the impact of additional common stock issuances on shareholders." In fact, the proponent was asking for *more* common stock to be issued. However, because of the prescriptive nature of the proposal and focus on "the terms upon which common stock is to be issued," the Staff agreed that the proposal was excludable under Rule 14a-8(i)(7). Similarly, while the proposal in *Astronics Corp.* (avail. Mar. 2, 2001) called for the redemption and conversion of a class of the company's stock, the proponent indicated in a letter to the Staff that it was motivated in part by a concern for "shareholder rights," as opposed to solely by the impact of additional stock issuances on shareholders. As in these precedents, the Proposal relates to the Company's capital structure and seeks to dictate the terms upon which the Franchise Preferred Stock is issued. Thus, the Proposal relates to the Company's ordinary business operations and is excludable under Rule 14a-8(i)(7).

B. The Proposal Impermissibly Micro-Manages The Company By Specifying Detailed Terms Of The Proposed Franchisee Preferred Stock.

The Response Letter argues that the Proposal is not excludable under the micro-management prong of Rule 14a-8(i)(7) since the Proposal lists the specific terms of the Franchisee Preferred Stock merely to describe "how Franchisee Preferred [S]tock *could* accomplish [the] goal" of electing a Franchisee Director (as defined in the Proposal) without conferring any economic benefit to Franchisees (as defined in the Proposal) (emphasis added). We believe this interpretation contradicts the express language of the Proposal. Specifically, although the

Response Letter describes the Proposal as flexible, the Proposal is prescriptive because it asks that the implementing amendments to the Company's governing documents "provide that" the Franchisee Preferred Stock include six detailed features. Moreover, the Supporting Statement expressly references the "terms" in the Proposal rather than using more general language such as "our suggested guidelines" or framing the terms as examples. And while the Response Letter asserts that the Proponent wanted to avoid vague language in the Proposal, the details provided in the Proposal go beyond merely explaining to shareholders that Franchisees will gain no economic benefit from the Franchisee Preferred Stock.

Moreover, the Response Letter's attempt to distinguish the Proposal from the precedent cited in the No-Action Request is misguided. As discussed in detail in the No-Action Request, the Proposal is extremely specific about how the Franchisee Preferred Stock is to be implemented. Yet the Response Letter alleges that the Proposal is less prescriptive than the proposals in the cited precedent because it does not impose a deadline for implementation. However, many of the proposals addressed in the precedents cited in the No-Action Request that the Staff concurred sought to impermissibly micro-manage a company did not specify *any* implementation deadline. *See, e.g.*, *General Electric Co.* (avail. Jan. 25, 2012, *recon. denied* Apr. 16, 2012); *Marriott International Inc.* (avail. Mar. 17, 2010); *Ford Motor Co.* (avail. Mar. 2, 2004). The Response Letter also asserts that the Proposal does not control all of the details of implementation because it does not specify the amount of the nominal consideration to be paid for shares of the Franchisee Preferred Stock. Yet by providing that the consideration for the shares "should be a minimal amount" and that the Franchise Preferred Stock should be redeemable "by the Company at nominal cost," the Proposal does dictate these terms by requiring that in both cases the amount of consideration be insignificant.

Finally, it is irrelevant that the Proposal lacks the scientific complexity of the proposals in *Apple, Inc.* (avail. Dec. 5, 2016) and *Deere, Inc.* (avail. Dec. 5, 2016), which were cited in the No-Action Request. The Proposal and the proposals in the cited precedents each micro-manage to a similar degree. Here, the decisions related to the issuance of Company stock to Franchisees in numerous countries around the world are precisely the types of day-to-day business operation decisions that are so complex "that they could not, as a practical matter, be subject to direct shareholder oversight." *See* Exchange Act Release No. 40018 (May 21, 1998). Specifically, the Company has Franchisees in over 100 countries and would thus need to undertake significant efforts in order to issue the Franchisee Preferred Stock in each of these countries and in the manner specified in the Proposal, including retaining local counsel and analyzing whether the Franchisee Preferred Stock that conforms with the multitude of terms set forth in the Proposal can be granted in compliance with local law in all of these countries, determining whether securities registration is necessary, analyzing the tax and accounting consequences of the various terms, and tracking and monitoring transfers and redemptions of the Franchisee Preferred Stock to confirm they comply with the Proposal's terms. As such, as discussed in greater detail in the No-Action Request, the Proposal is similar to the proposals in *Apple* and *Deere* in that the intricate details required to be addressed by the Proposal would touch upon every aspect of the Company's operations and thus would necessarily impinge on management's ability to operate the Company's business on a day-to-day basis.

For all of these reasons and as discussed in the No-Action Request, the Proposal is excludable under Rule 14a-8(i)(7).

II. The Proposal May Be Excluded Under Rule 14a-8(i)(2) Because Implementation Of The Proposal Would Cause The Company To Violate Delaware Law And Rule 14a-8(i)(6) Because The Company Lacks The Power And Authority To Implement The Proposal.

The Response Letter argues that the Proposal is not excludable under Rule 14a-8(i)(2) because the Franchisee Preferred Stock qualifies as valid preferred stock under Delaware either due to its redemption mechanic or, assuming the redemption mechanic is not a preference, due to the "exclusive" voting rights it would confer on the Franchisees (*i.e.*, the right to elect the Franchisee Director). The Response Letter relies on the opinion of the Proponent's counsel, Grant & Eisenhofer P.A. (the "G&E Opinion"), to arrive at that conclusion. However, as explained in the supplemental legal opinion provided by Morris, Nichols, Arsht & Tunnell LLP (the "Supplemental Delaware Law Opinion"), "G&E has presented an advocacy piece on what it thinks the law should be, not a reliable presentation of what the law currently is." A copy of the Supplemental Delaware Law Opinion is attached to this letter as Exhibit A.

More specifically, as discussed in greater detail in the original Delaware Law Opinion (as defined in the No-Action Request) and reiterated in the Supplemental Delaware Law Opinion, the redemption mechanic is a "*restriction*" on the Franchisee Preferred Stock, and "[t]he Delaware Court of Chancery has stated that when stock terms 'speak of burdens' on the stock, *those terms are not preferences* because 'the distinguishing characteristic of preferred . . . stock speaks of *rights or favors in relation* to other stock'"[1] (emphasis added). Furthermore, as the Supplemental Delaware Law Opinion makes clear, both Section 151(a) of the Delaware General Corporation Law and Delaware courts recognize "that *all voting powers* (*i.e.*, full voting powers and limited voting powers) *are not preferences*" (emphasis added). In fact, as explained in the Supplemental Delaware Law Opinion, even when a class or series of stock possesses the exclusive right to vote on all matters or on certain matters, the Delaware courts have found that such a voting right does not constitute a preference. Therefore, according to the Supplemental Delaware Law Opinion, G&E's "exclusive voting rights" argument is "not supported by the case law, and the right to elect the Franchisee Director is not a preference."

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[1] *Starring v. American Hair & Felt Co.*, 191 A. 887, 891 (Del. Ch. 1937), *aff'd*, 2 A.2d 249 (Del. 1937).

Finally, as discussed in the Supplemental Delaware Law Opinion, "[t]o be 'preferred' stock is to be a class of stock with a 'preference' or 'special right' as against another class of stock, with the preference or right going to *periodic returns, capital payouts or both*"[2] (emphasis added). As such, the Supplemental Delaware Law Opinion makes it clear that because the Franchisee Preferred Stock would not entitle Franchisees to any returns or capital payouts, it, therefore, "would not qualify as preferred stock under Delaware law."

For all of these reasons and as discussed in the No-Action Request and the original Delaware Law Opinion, the Proposal is excludable under Rule 14a-8(i)(2) because implementation of the Proposal would cause the Company to violate Delaware law and Rule 14a-8(i)(6) because the Company lacks the power and authority under Delaware law to implement the Proposal.

CONCLUSION

Based upon the foregoing analysis and the No-Action Request, we respectfully request that the Staff concur that it will take no action if the Company excludes the Proposal from its 2017 Proxy Materials.

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 Denise A. Horne, the Company's Corporate Vice President, Associate General Counsel and Assistant Secretary, at (630) 623-3154.

Sincerely,

Elizabeth Ising

Elizabeth A. Ising

Enclosures

cc: Denise A. Horne, McDonald's Corporation
Maureen O'Brien, Segal Marco Advisors

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[2] *Matulich v. Aegis Communications Group, Inc.*, 942 A.2d 596, 599-600 (Del. 2008) (quoting William W. Bratton, *Corporation Finance* 486 (6th ed. 2008)).

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EXHIBIT A

Morris, Nichols, Arsht & Tunnell LLP

1201 North Market Street
P.O. Box 1347
Wilmington, Delaware 19899-1347

302 658 9200
302 658 3989 Fax

March 2, 2017

McDonald's Corporation
One McDonald's Plaza
Oak Brook, Illinois 60523

RE: Stockholder Proposal Submitted by The Marco Consulting Group Trust I

Ladies and Gentlemen:

This letter supplements our opinion dated January 23, 2017 regarding the Proposal referenced above.[1] In our January 23rd opinion, we expressed our view that the Proposal would violate Delaware law if implemented and that the Company lacks the power and authority to implement the Proposal. The Proponent retained Grant & Eisenhofer P.A. ("G&E") to write a letter disputing the conclusions in our January 23rd opinion.[2] We respond to G&E's arguments here.

The Proposal calls for the adoption of a preferred stock (the Franchisee Preferred) that would entitle its holders (Franchisees) to elect a director (the Franchisee Director). G&E concedes that under Delaware law preferred stock must have a preference. G&E identifies only two stock terms in the Proposal as potentially qualifying as preferences under Delaware law: (i) the right to elect the Franchisee Director and (ii) a redemption mechanic whereby the Company can redeem the Franchisee Preferred when a Franchisee ceases to own a franchised restaurant. Our January 23rd opinion presents statutory and case law on point to show why these terms are not preferences. G&E has responded by inventing legal theories to distinguish the Proposal. At best, G&E has presented an advocacy piece on what it thinks the law should be, not a reliable presentation of what the law currently is.

G&E asserts that the right to elect the Franchisee Director is a preference because it is an "exclusive" voting right that is "not shared with any other class of stock issued by the Company."[3] Under this novel theory, the cases that hold a voting right is not a preference would pertain only to voting rights shared with other classes of stock. This distinction does not appear in the DGCL or the Delaware case law. Section 151(a) establishes what terms may be included in capital stock, and (as noted in our January 23rd opinion), that section distinguishes between

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[1] Defined terms in this letter have the same meaning as in our January 23rd opinion.

[2] Letter submitted by G&E on February 13, 2017 ("G&E Letter").

[3] G&E Letter at 7.

"voting powers, *full or limited*" on one hand and "preferences" on the other. The statute does not distinguish preferences from "voting rights shared with other classes of stock." Section 151(a) therefore recognizes that all voting powers (i.e., full voting powers and limited voting powers) are not preferences. The Delaware courts agree. In *Starring v. American Hair & Felt Co.*, the Delaware Court of Chancery held that "[f]rom this examination of the section [, the predecessor to Section 151(a)], I think the conclusion is inescapable that special powers with respect to voting are not to be catalogued with 'preferences and relative, participating, optional or other special rights.'"[4] The Delaware Court of Chancery's decision in *Telvest v. Olson*[5] (discussed at length in our January 23rd opinion) also contradicts this "exclusive voting versus shared voting" distinction that G&E has invented. The preferred stock at issue in *Telvest* would have given its holders a class vote on various business combinations; a vote not shared with the holders of common stock.[6] In *Telvest* the court declined to classify this exclusive voting right as a preference and instead expressed doubt about the validity of the stock. Accordingly, G&E's novel "exclusive voting rights" argument is not supported by the case law, and the right to elect the Franchisee Director is not a preference.[7]

G&E also incorrectly concludes that the redemption mechanic envisioned by the Proposal is a preference. This redemption term is a *restriction* on the Franchisee Preferred. It would enable the Company to cancel the Franchisee Preferred and its voting power for nominal consideration (or, in the Proponent's own terms, for no "economic benefit of any kind").[8] Section 151(a) of the DGCL draws a distinction between "preferences" and "restrictions."[9] The Delaware Court of Chancery has stated that when stock terms "speak of burdens" on the stock, those terms are not preferences because "the distinguishing characteristic of preferred . . . stock

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4 191 A. 887, 891 (Del. Ch. 1937), *aff'd*, 2 A.2d 249 (Del. 1937). Contrary to G&E's assertion, the stock at issue in *Starring* possessed the exclusive right to vote on all matters, absent certain specified events of default, and the Court still concluded that such an exclusive right did not qualify as a preference.

5 *Telvest Inc. v. Olson*, 1979 WL 1759 (Del. Ch. Mar. 8, 1979).

6 The Court describes the voting powers on pages *2-3 of the Westlaw version of the opinion. The Court states that the preferred stock would have been entitled to no voting rights except enumerated items upon which the preferred stock "shall be entitled to vote as a class." In other words, the preferred stock would have possessed a separate class vote to the exclusion of the holders of common stock. These voting rights included a class vote on certain future issuances of stock, which is a matter that the common stockholders would not have a right to vote on under the DGCL.

7 We can understand G&E's confusion on this issue. In describing the terms of preferred stock, it is not uncommon for practitioners (and occasionally even the courts in passing references) to describe all of the terms of preferred stock (even voting rights) as "preferences." *See, e.g., Kleinberg v. Cohen*, 2017 WL 568342 (Del. Ch. Feb. 13, 2017); *In re Affiliated Computer Services, Inc. S'holders Litig.*, 2009 WL 296078 (Del. Ch. Feb. 6, 2009). However, the courts that have specifically addressed the issue of what constitutes a qualifying preference for determining the validity of a preferred stock have found that a voting right does not constitute a preference. *See Telvest*, 1979 WL 1759; *Starring*, 191 A. 887.

8 Letter submitted by Proponent on February 13, 2017 at 4.

9 Specifically, Section 151(a) provides that a corporation may issue classes and series of stock that "may have such voting powers, full or limited, or no voting powers, and *such* designations, *preferences* and relative, participating, optional or other special rights, and qualifications, limitations *or restrictions* thereof . . . ." 8 *Del. C.* § 151(a) (emphasis added).

speaks of rights or favors in relation to other stock."[10] The redemption mechanic simply is not a preference.

Finally, the redemption mechanic and Franchisee Director rights are not financial terms, and therefore they cannot qualify as preferences. In the Delaware Supreme Court's *Matulich v. Aegis Communications Group, Inc.* decision, the Court favorably quoted scholarly commentary for the proposition that:

> [Section 151(a)] hand[s] the drafter of the corporate charter a blank slate on which to fill in the rights of different classes of equity participants-rights which by definition concern periodic returns, capital payouts on (or prior to) liquidation, and voting. On the blank slate the drafter may parse those rights among multiple classes of stock as he or she sees fit. To be "preferred" stock is to be a class of stock with a "preference" or "special right" as against another class of stock, *with the preference or right going to periodic returns, capital payouts or both.*[11]

G&E quoted this sentence but used ellipses to omit the italicized language. Preferences involve financial benefits: that is, rights "going to periodic returns, capital payouts or both." The Franchisee Preferred would not entitle Franchisees to any returns or capital payouts. It therefore would not qualify as preferred stock under Delaware law.

It remains our opinion that (1) the Proposal would violate Delaware law if it were implemented and (2) the Company lacks the power and authority to implement the Proposal.

Very truly yours,

Morris, Nichols, Arsht & Tunnell LLP

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10 *Starring*, 191 A. at 891.

11 *Matulich*, 942 A.2d 596, 599-600 (Del. 2008) (quoting William W. Bratton, *Corporation Finance* 486 (6th ed. 2008) (emphasis added).

Segal Marco Advisors

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February 13, 2017

Via e-mail at 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 McDonald's Corporation to omit proposal by The Marco Consulting Group Trust I

Dear Sir/Madam,

Pursuant to Rule 14a-8 under the Securities Exchange Act of 1934, the Marco Consulting Group Trust I ("Proponent") submitted a shareholder proposal (the "Proposal") to McDonald's Corporation ("McDonald's" or the "Company"). The Proposal asks McDonald's board to take the necessary steps to adopt a plan to give McDonald's Franchisees (as defined in the Proposal) the ability to elect a director (the "Franchisee Director") to McDonald's board. The Proposal asks that this new board governance structure be effected through the creation and issuance to Franchisees of a new class of preferred stock (the "Franchisee Preferred stock") that confers voting but not economic rights on the holder.

In a letter to the Division dated January 23, 2017 (the "No-Action Request"), McDonald's stated that it intends to omit the Proposal from its proxy materials to be distributed to shareholders in connection with the Company's 2017 annual meeting of shareholders. McDonald's argues that it is entitled to exclude the Proposal in reliance on Rule 14a-8(i)(7), as relating to the Company's ordinary business operations; Rule 14a-8(i)(2), because the Proposal would cause McDonald's to violate Delaware law; and Rule 14a-8(i)(6), on the ground that McDonald's lacks the power and authority to implement the Proposal. As discussed more fully below, McDonald's has not met its burden of proving its entitlement to rely on either exclusion; accordingly, the Proponent respectfully asks that the Company's request for relief be denied.

Ordinary Business

McDonald's argues that the Proposal relates to the company's ordinary business operations and is therefore excludable in reliance on Rule 14a-8(i)(7). Quoting from the Commission's 1998 Release,[1] which articulated the policy considerations relevant to applying the ordinary business exclusion (the "1998 Release"), McDonald's claims that the Proposal (a) involves a task fundamental to the ability of McDonald's management to run the business on a day-to-day basis, and (b) tries to micromanage McDonald's. Both of those contentions are unavailing, however, because the Proposal's objective is a significant governance reform—specifically, a change in how McDonald's board is elected—which does not involve McDonald's day-to-day operations or micromanagement.

The Proposal Aims to Add a Franchisee Director to the Board, and Uses the Issuance of a New Class of Stock Solely as a Mechanism to Effect that Governance Reform

McDonald's ordinary business arguments hinge on a technical, and incorrect, reading of the Proposal. McDonald's frames the Proposal as addressing the Company's capital structure and likens it to proposals on capital structure the Staff has allowed issuers to omit. But McDonald's has it backward: The main thrust of the Proposal is to provide board representation to Franchisees, and issuing shares of a new class of preferred stock to Franchisees is just the mechanism proposed to effect that representation.

The centrality of board representation to the Proposal can be seen in the structure of the resolved clause. The first sentence asks that steps be taken to adopt a plan to give Franchisees the power to elect one new member of the board, then requests that this goal be achieved "<u>by issuing</u> to Franchisees shares of a new class of preferred stock" (emphasis added). As well, the supporting statement provides strong evidence that board representation is the Proposal's goal, rather than stock issuance itself. The supporting statement makes the case that formal Franchisee voice on the board would serve the interests of McDonald's and its shareholders, given the key role Franchisees play in value creation for McDonald's. The last full paragraph of the supporting statement explains, "Our proposal <u>uses the Franchisee Preferred</u> to provide an independent selection mechanism for the Franchisee Director that would not require membership in any franchisee association or other organization" (emphasis added).

Indeed, in making its micromanagement argument, McDonald's appears to agree with our characterization of the preferred stock issuance as secondary to the objective of giving Franchisees a voice on the board. The No-Action Request asserts on page 6 that "the Proposal impermissibly seeks to micro-manage the Company by

[1] Exch. Act Rel. No. 40018 (May 21, 1998).

requesting that, <u>in order to achieve the goal of Board representation of the ‘Owner/Operators of McDonald’s restaurants who pay royalties to the Company</u> . . . the Board issue the Franchisee Preferred Stock” (emphasis added).

The Proposal’s primary objective of adding Franchisee board representation distinguishes it from the proposals at issue in the determinations McDonald’s cites. The proposals in three of those determinations asked that additional common stock not be issued without shareholder approval. In none of the proposals was stock issuance secondary to the achievement of a separate, governance-related objective, and there was no question that the proposals “related to” the companies’ capital structure. The supporting statements made clear that the proponents were concerned solely with the impact of additional common stock issuances on shareholders. For example, in *Bank of America Corp.* (available Jan. 10, 2011), the supporting statement focused on dilution of existing shareholders by the issuance of additional shares, including shares reserved for equity incentives. Here, however, the Proposal’s supporting statement does not describe the advantages or disadvantages to shareholders as a result of additional share issuance or other actions affecting capital structure such as share buybacks or redemptions. Thus, those determinations are inapposite.

In the 1998 Release, the Commission explained that shareholders should not be permitted to weigh in on tasks management must perform to run the company on a day-to-day basis because shareholder oversight, which occurs only once a year at the annual meeting, would be impractical. Changing McDonald’s governance structure to provide Franchisee board representation, which would happen only once, is not the kind of mundane task “fundamental” to management’s ability to run the business contemplated by the Commission in the 1998 Release.

In sum, the Proposal relates to board representation for Franchisees, a governance reform that is not the kind of day-to-day task on which the ordinary business exclusion seeks to preclude shareholder oversight. Unlike the proposals in the determinations McDonald’s cites, the Proposal is not primarily concerned with McDonald’s capital structure; the issuance of Franchisee Preferred stock is simply a vehicle for facilitating the selection of a Franchisee Director. Accordingly, exclusion on ordinary business grounds would be inappropriate.

The Proposal Does Not Seek to Micro-Manage McDonald’s By Specifying Terms of the Proposed Franchisee Preferred Stock Aimed at Limiting the Economic Impact of the Shares on Franchisees and Common Shareholders

McDonald’s makes much of the the fact that the Proposal requests that the Franchisee Preferred stock should be issued on a one share/one franchised restaurant basis for nominal consideration; be redeemable at nominal cost when a Franchisee ceases to own a franchised restaurant; not be transferable to anyone other than McDonald's; and should entitle the holder only to vote on the Franchisee Director and not to any economic benefit, such as a liquidation preference. Recommending those terms, McDonalds's urges, constitutes micro-management.

The purpose of outlining terms of the Franchisee Preferred stock is to make clear that the stock is to serve only as a vehicle for electing the Franchisee Director, and not to confer economic benefit of any kind on Franchisees. Absent such terms, holders of common stock voting on the Proposal might rightfully be concerned that the Franchisee Preferred stock could be a means of transferring value to Franchisees. Rather than leave the economics of the stock to shareholders' imaginations, or use vague language like "the Franchisee Preferred stock should confer no economic benefit on Franchisees," the Proposal describes how Franchisee Preferred stock could accomplish that goal.

Analysis of the 1998 Release shows that the Proposal's description of potential Franchisee Preferred stock terms does not implicate the Commission's micro-management concerns. Specifically, the Commission stated that ordinary business matters might involve complexity that would preclude shareholders from making an "informed judgment." The Commission explained that this 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."

Here, deciding whether Franchisee representation on the board would enhance long-term shareholder value fits squarely within the range of issues on which shareholders regularly make informed judgments. In past years, shareholders have been asked to vote on many proposals involving board representation of various constituencies, including union members (DuPont in 1997 and 2002); employees (Ashland in 1997, UAL in 2002); and non-executive retirees (Raytheon in 2005; GE in 2006, 2007 and 2015; Aetna in 2007, 2008 and 2009). (See
http://www.computershare-na.com/sharedweb/georgeson/acgr/acgr1997.pdf, at 12;
http://www.computershare-na.com/sharedweb/georgeson/acgr/acgr2002.pdf, at 14;
http://www.computershare-na.com/sharedweb/georgeson/acgr/acgr2005.pdf, at 28;
http://www.computershare-na.com/sharedweb/georgeson/acgr/acgr2006.pdf, at 31;
http://www.computershare-na.com/sharedweb/georgeson/acgr/acgr2007.pdf, at 29;
http://www.computershare-na.com/sharedweb/georgeson/acgr/acgr2008.pdf, at 30;
http://www.computershare-na.com/sharedweb/georgeson/acgr/acgr2009.pdf, at 30;
http://www.computershare-na.com/sharedweb/georgeson/acgr/acgr2015.pdf, at 33)

McDonald's claims that shareholders are not well positioned to make an informed judgment on the Proposal because it does not "offer[] any support for the proposition that the creation of the Franchisee Preferred Stock and a new director position on the Board would be an effective method for increasing Franchisee representation within the Company." (No-Action Request, at 7) We note that adding a representative to the board, by definition, increases a constituency's "representation within the Company," so the precise nature of McDonald's objection is unclear. More fundamentally, though, the persuasiveness of a proposal's supporting statement is appropriately raised in the company's statement in opposition to the proposal, and has no bearing on whether shareholders are capable of making an informed judgment on the subject of the proposal. (See Staff Legal Bulletin 14B (Sept. 15, 2004) (factual statements in a shareholder proposal that are not supported, or that can be disputed or countered, should be addressed by the company in its statement in opposition)).

McDonald's likens the Proposal to proposals in several Staff determinations, but none of those proposals sought a change to companies' corporate governance. Instead, they addressed aspects of companies' operations, often involving scientific or technical complexity not present here. For instance, in Apple, Inc. (available Dec. 5, 2016) and Deere & Co. (available Dec. 5, 2016), the proposal would have imposed a specific time frame and quantitative targets for the company to use in reaching a net-zero greenhouse gas emissions goal, and Ford Motor Co. (available Mar. 2, 2004) involved a report on global warming whose technical contents and methodologies were specified in the proposal. Likewise, in Marriott International Inc. (available Mar. 17, 2010) and Duke Energy Corp. (available Feb. 16, 2001), the proposals specified the use of particular technologies to achieve environmental goals.

Even where a proposal did not address a scientific or technical topic, specifying numerous detailed aspects of how the proposal should be implemented has led to exclusion on ordinary business grounds. In two determinations on which McDonald's relies, General Electric Co. (available Jan. 25, 2012, *recon. denied* Apr. 16, 2012) and Amazon.com Inc. (available Mar. 20, 2013), the proposals sought to control every aspect of the companies' implementation of the proposals, including specific dates, announcement methods, evaluation standards, personnel, prize amounts and other details. In Amazon, the proposal asked the company to hold a public competition for giving public advice on the items in the proxy statement, with the winner to be chosen by shareholder vote; the proposal even specified the precise wording of the management proposal on which shareholders would vote to choose the victor.

All of the proposals in the determinations McDonald's cites sought to control the details of proposal implementation far more exactly than the Proposal. The Proposal does not, for example, purport to set a deadline by which McDonald's must create the Franchisee Preferred stock, nor does it prescribe how the addition of the Franchisee Director should be announced. It does not specify the amount of the nominal consideration Franchisees would pay for shares of Franchisee Preferred stock.

The Proposal urges the addition of a Franchisee Director to the board, a reform of McDonald's corporate governance and not a matter related to McDonald's ordinary business operations. The Proposal suggests the use of Franchisee Preferred stock to facilitate the selection of the Franchisee Director, and sets forth basic terms designed to limit the economic impact of the Franchisee Preferred stock. Those terms are not nearly as detailed as the proposals in the cited determinations, none of which dealt with corporate governance. Accordingly, the Proposal should not be viewed as micro-managing McDonald's and the Company's request for relief on ordinary business grounds should be denied.

Validity of Franchisee Preferred Stock Under Delaware Law

McDonald's contends that it is entitled to exclude the Proposal in reliance on Rule 14a-8(i)(2) and (i)(6)[2] because implementation of the Proposal would violate Delaware law. Specifically, McDonald's contends that the terms of the Franchisee Preferred stock do not confer a preference, as required by Delaware law. McDonald's relies on an opinion provided by Morris, Nichols, Arsht & Tunnell LLP (the "Morris Nichols Opinion") which states that "preferences must be financial in nature" and that the right to elect the Franchisee Director does not qualify as a preference for Delaware law purposes. (See No-Action Request, at 9).

The Proponent's Delaware counsel, Grant & Eisenhofer PA, disputes the characterization of Delaware law set forth in the Morris Nichols Opinion and has provided an opinion that the Proposal, if implemented, would not violate Delaware law. A copy of Grant & Eisenhofer's Delaware law opinion (the "G&E Opinion") is attached to this letter as Exhibit A.

As discussed in greater detail in the G&E Opinion, the Morris Nichols Opinion is incorrect in two respects. First, the Morris Nichols Opinion concedes that a redemption right can constitute a preference, but nonetheless claims that the terms of the Franchisee Preferred stock, which provide for redemption when a holder ceases to be a Franchisee, include no preference. That redemption right, the G&E Opinion asserts, qualifies as a preference. (G&E Opinion, at 5-6)

Even assuming the redemption right is not a preference, the G&E Opinion states, the Morris Nichols Opinion misreads Delaware law to conclude that voting rights can never be a preference. The Delaware cases on which the Morris Nichols Opinion relies support only the proposition that voting rights shared by holders of other classes of stock cannot be considered a preference. After reviewing the cases in

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[2] McDonald's arguments under both exclusions hinge on the legality of the Franchisee Preferred stock: Rule 14a-8(i)(2) allows exclusion if the proposal would violate state law, and McDonald's claims the illegality of the Franchisee Preferred stock means McDonald's lacks the power or authority to implement the proposal, supporting exclusion pursuant to Rule 14a-8(i)(6).

detail, the G&E Opinion asserts that "neither *Starring* nor *Telvest* supports the sweeping conclusion offered in the Morris Nichols Opinion that the Proposal's suggested exclusive voting rights to be granted to holders of the Franchisee Preferred stock do not confer valid preference rights under Delaware law." (G&E Opinion, at 8) Implementing the Proposal by issuing the Franchisee Preferred stock would therefore not violate Delaware law. (G&E Opinion, at 9)

Because the G&E Opinion directly contradicts the Morris Nichols Opinion, McDonald's has failed to satisfy its burden of proving its entitlement to exclude the Proposal in reliance on Rule 14a-8(i)(2) or (i)(6). The Proponent respectfully asks that McDonald's request to omit the Proposal on these bases be denied.

****

Please contact the undersigned with questions or should you need additional information at 312-612-8446.

Sincerely,

Maureen O'Brien
Vice President, Director of Corporate Governance

cc: Elizabeth A. Ising
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WRITER'S DIRECT DIAL NUMBER

February 13, 2017

VIA EMAIL

Ms. Maureen O'Brien
Vice President and Corporate Governance Director
Segal Marco Advisors
550 West Washington Blvd., Suite 900
Chicago, IL 60661

Re: McDonald's Corporation
Shareholder Proposal of The Marco Consulting Group Trust I

Dear Ms. O'Brien:

You have requested our opinion as to whether the shareholder proposal (the "Proposal") submitted by The Marco Consulting Group Trust I to McDonald's Corp. ("McDonald's" or the "Company"), a Delaware corporation, would, if adopted and implemented, violate Delaware law, and whether the Company has the power and authority to implement the Proposal.

You have furnished us with, and we have reviewed, copies of the Proposal and the supporting statement to be submitted to the Company. We have also reviewed a letter submitted on behalf of the Company, dated January 23, 2017, to the Division of Corporation Finance ("Division") of the U.S. Securities and Exchange Commission (the "Commission") stating that the Company intends to omit the Proposal from its proxy materials to be distributed in connection with the Company's 2017 annual meeting (the "Proxy Statement") and an attached letter to the Company from Morris, Nichols, Arsht & Tunnell, dated January 23, 2017 (the "Morris Nichols Opinion") expressing the opinion that: (i) the Proposal would violate Delaware law if it were implemented; and (ii) the Company lacks the power and authority to implement the Proposal. We have also reviewed the Company's Restated Certificate of Incorporation, dated June 14, 2012, and filed with the Commission on August 6, 2012.

As explained more fully below, we believe that the Proposal is consistent with Delaware law and that, if adopted and implemented, it would not violate Delaware law. In addition, it is our opinion that McDonald's has the power and authority to issue shares of Franchisee Preferred stock as contemplated by the Proposal.

I. Proposal Overview

The Proposal requests that the Company's board of directors (the "Board") "take the necessary steps (including initiating appropriate amendments to the certificate of incorporation and bylaws and excluding those steps that must be taken by shareholders) to adopt a plan to give [Franchisees] the power to elect one new member of the Board, by issuing to Franchisees shares of a new series of preferred stock ("Franchisee Preferred") whose holders are entitled to elect the new director (the "Franchisee Director")." The Proposal further requests that each Franchisee receive one share of Franchisee Preferred for each franchised restaurant, and that the Franchisee Preferred be redeemable by the Company if the Franchisee no longer owns a franchised restaurant. In addition, the Proposal requests that the Franchisee Preferred holders not be entitled to dividends or any amounts upon the liquidation, termination or dissolution of the Company. The Proposal also requests that the only matter on which Franchisee Preferred holders may vote is for the election of the Franchisee Director, and that the Franchisee Preferred shares not be transferable to anyone but the Company. Finally, the Proposal requests that the Franchisee Preferred holders be given the authority to nominate and elect the Franchisee Director, who may be required to satisfy the director qualifications applicable generally to independent directors.

Essentially, the Proposal asks the Board to take the necessary steps (including amending the certificate) to create a new class of preferred shares that would allow Franchisees, *and only Franchisees*, to elect a single additional director to the Board, exclusive of the voting rights of any other stockholder of the Company. The right to elect the Franchisee Director as provided in the proposed preferred share would not be shared with any voting right associated with any other class of stock issued by the Company.

II. Delaware Law

a. Summary of Our Opinion on Delaware Law

We believe Delaware law allows corporations to issue preferred stock with the powers and restrictions contemplated by the Proposal. It is well settled under Delaware law that the rights of preferred stockholders are contractual in nature, and that the contract terms for such preferred stock are to be bargained for by the parties to the agreement. Thus, the rights that may be provided to holders of preferred stock are broad, provided they do not violate public policy. *Ellingwood v. Wolf's Head Oil Refining Co.*, 38 A.2d 743, 747 (Del. Ch. 1944). As a result, we believe that, if adopted and implemented, the Proposal would not violate Delaware law. The voting powers, designations, preferences or other special rights relating to preferred stock are to be set forth in the certificate of incorporation, or may be set forth in a resolution approved by the company's board of directors if such power is granted under the certificate of incorporation. 8 Del. C. § 151(a). There is nothing under Delaware law that precludes a company's certificate of incorporation from providing exclusive voting rights for designated directors to a particular class of stock.

The conclusion in the Morris Nichols Opinion that the Proposal, if adopted, would be invalid under Delaware law hinges on the unqualified assertion that a voting right, in and of itself, is not a valid "preference" under Delaware law. The Morris Nichols Opinion takes an unjustified and overly restricted reading of Delaware law. The cases they cite stand simply for the proposition that voting rights shared with stockholders generally cannot be considered a "preference" if also shared with preferred stockholders. The particular voting right proposed here, however, would be *exclusive* to the new class of preferred shares, and is sufficiently distinct to qualify as a "preference" under Section 151(a) of the Delaware General Corporation law.

b. Analysis

(i) Rights Of Preferred Stockholders Are Contractual In Nature

The DGCL provides in relevant part that for companies authorized to issue more than one class of stock, the certificate of incorporation shall set forth the following with respect to shares of stock: (i) number of shares of all classes; (ii) number of shares for each class of stock; (iii) the par value for each class; and (iv) a statement of designations, powers, preferences and rights, qualifications, limitations or restrictions on the shares as permitted under §151 of the DGCL. McDonald's has specified in its certificate of incorporation that the Company is authorized to issue 3.665 billion shares of stock, consisting of 3.5 billion shares of common stock with a par value of one cent, and 165 million shares of preferred stock with no par value.[1]

The DGCL does not specify the permissible preference rights that may be granted to holders of preferred stock. Instead, "preferred stock, as the term implies, is entitled to certain preferences over other stock. The word 'preferred' conveys no special meaning in the abstract. The preferences must be specifically defined in the governing instruments." *Shintom Co. v. Audiovox Corp.*, 888 A.2d 225, 228 (Del. 2005). The Delaware Supreme Court has explained that:

> Delineating the specific rights and limitations of preferred shareholders is the function of corporate drafters. Section 151(a) has been described by one legal scholar as:
>
> > hand[ing] the drafter of the corporate charter a blank slate on which to fill in the rights of different classes of equity participants – rights which by

[1] McDonald's certificate of incorporation grants the board of directors the authority to issue one or more series of preferred stock, and to fix by resolution with respect to each series of preferred stock the number of shares and distinctive designations, the dividend rate, whether the share may be redeemed, the amount a holder of such shares may receive upon corporate liquidation, the voting powers of the series, and any other preferences, rights, limitations or restrictions allowed by law or the certificate of incorporation. Article FOURTH, Section B, Preferred Stock, Restated Certificate of Incorporation of McDonald's Corp., dated June 14, 2012. According to the Company's 9/30/2016 financial statements filed in its 10-Q on Nov. 4, 2016, McDonald's has not issued any shares of preferred stock.

> definition concern periodic returns, capital payouts on (or prior to) liquidation, and voting. On the blank slate the drafter may parse those rights among multiple classes of shares as he or she sees fit. To be "preferred" stock is to be a class of stock with a "preference" or "special right" as against another class of stock …

Matulich v. Aegis Communications Group, Inc., 942 A.2d 596, 599-600 (Del. 2008) (citations omitted).

The Delaware Supreme Court has consistently found that preferred stock rights "are contractual in nature and therefore are governed by the express provisions of a company's certificate of incorporation." *Rothschild Int'l Corp v. Liggett Group Inc.*, 474 A.2d 133 (Del. 1984), citing *Wood v. Coastal States Gas Corp.*, 401 A.2d 932 (Del. 1979) (finding that "the rights of the preferred shareholders as against the common shareholder are fixed by the contractual terms agreed upon when the class of preferred stock is created."), and *Ellingwood, supra.* Thus, the Proposal's requested contractual provisions are consistent with Delaware law.

There is, in fact, no required preference that preferred stock must carry in order to be deemed "preferred." Rather, it simply must carry some *bona fide* preference over other classes of stock. In *Shintom*, the Delaware Supreme Court explained:

> The Delaware General Corporation Law requires that preferred stock have *some* bona fide preference over other stock. A dividend right constitutes just one of several permissible preferences, *e.g.*, liquidation rights or redemption rights. The Delaware statutory scheme does not, however, require any particular form of preference. It allows private parties to contract for preferences between themselves and then specify the bargained for preferences in the certificate of incorporation or applicable resolution(s).

Shintom, 888 A.2d at 230 (Del. 2005) (emphasis in original).

Preferred shares also can carry enhanced voting rights. Over sixty years ago, the Supreme Court of Delaware recognized that a company's certificate of incorporation can provide voting rights to preferred shares. *See, e.g., Ellingwood v. Wolf's Head Oil Refining Co.*, 38 A.2d 743, 747 (Del. 1944) (affirming the right of holders of preferred stock to have sole power to elect directors in the event the company was in default on dividends, and explaining, "a certificate of incorporation may contain any provision with respect to the stock to be issued by the corporation, and the voting rights to be exercised by said stock, that is agreed upon by the stockholders, provided that the provision agreed to is not against public policy"). Although rare, Delaware corporations have adopted certificate provisions giving special voting rights to preferred shares, including the right to elect designated directors. *See* Discovery Communications, Inc. Restated Certificate of Incorporation, Article IV, Section C.5(b).

The Proposal's suggested terms for the shares of Franchisee Preferred stock are exactly the type of bargained for preference rights that are allowed under Delaware law. The special voting right that would be provided through the Franchisee Preferred stock is valid under Delaware law, and there is no particular form of preference required by the DGCL. Instead, preference rights are to be freely bargained for between the parties and must be stated clearly in the certificate of incorporation or applicable resolutions authorizing the preferred stock. *Shintom*, at 230.

The Morris Nichols Opinion does not dispute that Delaware permits parties to freely contract for terms in preferred shares, or that preferred shares can carry voting rights. Instead, the Morris Nichols Opinion argues that the Proposal, as drafted, does not suggest any *bona fide* preferences that would be recognized under Section 151 of the DGCL.

First, the Morris Nichols Opinion concedes that a redemption right *is* a *bona fide* preference within the meaning of Section 151.[2] Here, the Proposal suggests that the Franchisee Preferred stock carry a redemption right associated with the termination of the franchisee relationship. Even under Morris Nichols' analysis of Section 151, this redemption right would constitute as valid "preference," and their arguments to the contrary are misplaced.

Second, while conceding Section 151 does not provide an exclusive list of permissible preferences,[3] the Morris Nichols Opinion nevertheless argues that a voting right *can never* constitute a valid preference. This argument ignores that the special voting right that would be provided through each Franchisee Preferred share is *exclusive* and *not shared with any other class of stock issued by the Company*.

(ii) <u>The Proposal Suggests The Creation Of A New Class Of Preferred Shares With Redemption Rights Associated With The Termination Of A Franchise</u>

The Morris Nichols Opinion concedes that a right of redemption is a valid *bona fide* preference under Section 151 of the DGCL.[4] Here, the Proposal suggests that "the Franchisee Preferred should be redeemable by the Company at nominal cost when the Franchisee ceases to own a franchised restaurant." The Section 151(b) states in relevant part:

> ... Any stock which may be made redeemable under this section may be redeemed for cash, property or rights, including securities of the same or another corporation, at such time or times, price or prices, or rate or rates, and with such adjustments, as shall be stated in the certificate of incorporation or in the

[2] Morris Nichols Opinion, at 7.

[3] Morris Nichols Opinion, at 8, fn. 16.

[4] Morris Nichols Opinion, at 7.

> resolution or resolutions providing for the issue of such stock adopted by the board of directors…

8 *Del. C.* § 151(b). The Proposal, therefore, describes a proposed time (when the Franchisee ceases to own a franchised restaurant) and price or prices (nominal cost) for redemption, fully describing the kind of redemption right described in Section 151(b). And by providing the right to elect a special designated representative to the Board, the Franchisee Preferred stock provides a significant benefit to Franchisees that is not held by any other common stockholder.

The Morris Nichols Opinion rejects this analysis, arguing that a *bona fide* redemption right must provide a "financial benefit" to the stockholder.[5] This argument is wrong. First, Section 151(b) says nothing about the terms of any right of redemption, leaving such terms to the contracting parties.[6] But moreover, the Proposal itself suggests that the Franchisee Preferred stock be redeemed at "nominal cost." The suggestion in the Supporting Statement that the proposed terms of the Franchisee Preferred are not intended to provide a financial benefit does not preclude nominal consideration of cash, such as a dollar.[7] Second, Morris Nichols' argument that the suggested redemption provision is invalid as a preference because it is a restriction has been rejected by the Delaware courts. The Delaware Supreme Court specifically found that a nonredemption provision is a valid preference under § 151(a). *In re BiCoastal Corp.*, 600 A.2d 343, 349-350 (Del. 1991). In addition, the Court of Chancery found that a mandatory redemption right held by the issuing corporation is a valid preference. *Harbinger Capital Partners Master Fund I, Ltd. v. Granite Broadcasting Corp.*, 906 A.2d 218, 230-231 (Del. Ct. Ch. 2006). Moreover, this redemption is exclusive to and not shared with any other class of stock issued by the Company. There is no reference in the Company's Certificate of Incorporation to redemption rights for shares of common stock, and thus this redemption cannot be deemed coextensive with the rights of any other class of stock. Thus, the suggested redemption feature is another contractually bargained for preference right that is allowed under Delaware law.

(iii) <u>The Unique Voting Right Proposed For The Franchisee Preferred</u>

The Morris Nichols Opinion argues that voting rights can never constitute a valid preference under Delaware law.[8] Again, Morris Nichols is incorrect, and its argument is based on a superficial reading of Delaware precedent.

The proposed voting right associated with the Franchisee Preferred stock would be a completely unique voting right giving a right to holders of that class of securities the ability to

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[5] Morris Nichols Opinion, at 7.

[6] 8 Del. C. § 151(b).

[7] *See Hearn Bros, Inc. v. City of Newark*, 261 A.2d 532, 535 (Del. Ch. 1969) (recognizing validity of nominal consideration of $1.00).

[8] Morris Nichols Opinion, at 7.

elect one new director to the Company's Board. This voting right, if approved through the necessary channels (including amendment of the certificate), would be *unique* to the holders of Franchisee Preferred stock and not shared with any other class of stockholder. In addition, no other class of securities issued by the Company would be permitted to cast any vote for or against the Franchisee Director to be elected by the Franchisee Preferred stockholders.

As explained above, Delaware law long has recognized that preferred shares may be provided special voting rights, provided the voting rights are established through the corporate charter itself.[9] The Proposal advocates just that, and because the voting right for the designated director would be provided *only* to holders of Franchisee Preferred stock, it constitutes a valid preference under Delaware law. The cases relied upon in the Morris Nichols Opinion are not to the contrary. In both *Starring v. American Hair & Felt Co.*, 191 A. 887 (Del. Ch. 1937), *aff'd*, 2 A.2d 249 (Del. 1937), and *Telvest, Inc. v. Olson*, 1979 WL 1759 (Del. Ch. Mar. 8, 1979), the voting right at issue involved the ability to elect directors generally, a right that was *shared with* the common stockholders. The proposed voting right here is uniquely different.

Starring, in fact, involved *common stock.* There, the corporation's board sought to redeem the common stock and then reissue it in order to consolidate control in the hands of members of a particular industry. 191 A. at 889. In order to justify this redemption, the board argued that the *common stock* constituted "special stock" because it was the only class of stock allowed to vote for directors. There was nothing "special" about this voting power, because indeed it was shared among all common stockholders and provided voting rights for the entire board. *Id.*, at 891. Thus, the Court of Chancery did not limit the scope of its question to "preferences," but acknowledged the broad language of the Delaware statute including "relative, participating, optional or other special rights" that preferred or special stock may have. The Court simply was not called upon to consider the unique, director-specific voting right proposed for the Franchisee Preferred stock here. Nevertheless, the Court in *Starring* noted that "the distinguishing characteristic of preferred or special stock speaks of rights or favors in relation to other stock." *Id.* Here, the Franchisee Preferred would be given a voting right that is *not shared with* other voting shares. In other words, the voting right contemplated for the Franchisee Preferred would be a "right or favor" of the preferred stockholders that is not shared by the holders of common stock.

The Morris Nichols Opinion's reliance on *Telvest* is similarly misplaced. In *Telvest* the corporate board proposed to change the voting requirements for change in control transactions by issuing a new class of preferred stock that required an 80% supermajority vote to approve business combinations or transactions with any party owning 20% or more of the company's voting stock.[10] The Chancery Court issued a preliminary injunction blocking the issuance of

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[9] *See Rothschild Int'l Corp. v. Liggett Group, Inc., supra., Wood v. Coastal States Gas Corp., supra., Ellingwood v. Wolf's Head Oil Refining Co., supra.* Note, however, that the Delaware Supreme Court has held that a company's board of directors may not grant voting rights to preferred stock by resolution where the company's certificate of incorporation did not grant the board that power. *Waggoner v. Laster*, 581 A.2d 1127, 1135 (Del. 1990).

[10] *Id.*, at *1.

such shares, holding that the corporate directors could not change voting requirements established in the corporate charter through the issuance of preferred stock.[11] This holding has nothing to do with the proposed Franchisee Preferred shares here. In issuing its decision, however, the Chancery Court in *dicta* observed that there was "some question" regarding whether the proposed preferred shares had any valid preferences, because it had the same liquidation and dividend rights of the common shares, and because the only difference involved an elevated voting requirement regarding matters on which the common stockholders already had the right to vote.[12] The Morris Nichols Opinion seizes on this language as establishing an iron-clad rule that voting rights cannot provide a valid preference. But again, the Franchisee Preferred shares here would have a *new* voting right that is *not shared* with the common stockholders, regarding a matter on which the common stockholders would be precluded from voting. The dicta in *Telvest* does not address this point, and the Morris Nichols Opinion ignores this distinction entirely.[13]

For the reasons set forth above, neither *Starring* nor *Telvest* supports the sweeping conclusion offered in the Morris Nichols Opinion that the Proposal's suggested exclusive voting rights to be granted to holders of Franchisee Preferred stock do not confer valid preference rights under Delaware law. As the Delaware Supreme Court clearly stated in addressing the DGCL provisions relating to the creation of preferred stock, "The Delaware statutory scheme does not ... require any particular form of preference. It allows private parties to contract for preferences between themselves and then specify the bargained for preferences in the certificate of incorporation or applicable resolution(s)." *Shintom*, at 230. That is all the Proposal asks.

(ii) <u>McDonald's Has The Power And Authority To Issue Preferred Stock</u>

The Morris Nichols Opinion concludes that McDonald's lacks the power and authority to implement the Proposal based on its opinion that the Proposal would violate Delaware law if implemented. Morris Nichols Opinion, at 8-9. As a result, the Morris Nichols Opinion does not address the provisions in the Company's Certificate of Incorporation relating to the issuance of

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[11] *Id.*, at *6. See also *Waggoner v. Laster*, fn. 9 *supra*. Note that the Delaware General Assembly amended Section 151(g) in 1983 to clarify that a properly authorized certificate of designations for preferred stock has the effect of amending of the certificate of incorporation.

[12] *Id.*, at *5.

[13] The Morris Nichols Opinion also ignores the fact that in the cases on which they rely, the corporate action at issue involved unilateral board action in an attempt to alter existing stockholder rights. The Proposal, in contrast, contemplates informed stockholder participation in the statutorily prescribed manner to effect an amendment of the certificate of incorporation in order to create the Franchisee Preferred stock rights. The Delaware courts increasingly defer to corporations and their stockholders when their determinations are made pursuant to fully informed stockholder vote. *See Corwin v. KKR Financial Holdings LLC,* 125 A.3d 304 (Del. 2015) (finding that a merger approved by a fully informed, uncoerced stockholder vote was subject to the business judgment rule standard of review).

preferred stock. As explained above, it is our opinion that the Proposal would not violate Delaware law if implemented. In addition, based on our review of McDonald's Restated Certificate of Incorporation dated June 14, 2012, and filed with the Commission on August 6, 2012, we believe the Company has the power and authority to issue preferred stock on the terms suggested in the Proposal under Article FOURTH, consistent with the DGCL.

III. Conclusion

Based upon the foregoing, it is our opinion that the Proposal's plan, if adopted and implemented on the suggested terms, *would not* cause McDonald's to violate Delaware law. In addition, it is our opinion that McDonald's has the power and authority to issue preferred stock consistent with the suggested terms of the Proposal.

This opinion is furnished to you solely for the benefit in connection with the Proposal and is not to be used or relied upon by any person without our express written permission; provided that we hereby consent to your furnishing a copy of this opinion to the Staff of the Division of Corporate Finance of the U.S. Securities and Exchange Commission in connection with a no-action request with respect to the Proposal.

Sincerely,

Grant & Eisenhofer P.A.

GRANT & EISENHOFER, P.A.

GIBSON DUNN

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January 23, 2017

VIA E-MAIL

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

Re: *McDonald's Corporation*
Shareholder Proposal of The Marco Consulting Group Trust I
Exchange Act of 1934—Rule 14a-8

Ladies and Gentlemen:

This letter is to inform you that our client, McDonald's Corporation (the "Company"), intends to omit from its proxy statement and form of proxy for its 2017 Annual Meeting of Shareholders (collectively, the "2017 Proxy Materials") a shareholder proposal (the "Proposal"), including statements in support thereof (the "Supporting Statement"), received from The Marco Consulting Group Trust I (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 2017 Proxy Materials with the Commission; and

- concurrently sent copies 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 McDonald's Corporation ("McDonald's" or the "Company") request that the Board take the necessary steps (including initiating appropriate amendments to the certificate of incorporation and bylaws and excluding those steps that must be taken by shareholders) to adopt a plan to give the Owner/Operators of McDonald's restaurants who pay royalties to McDonald's (hereinafter, "Franchisees") the power to elect one new member of the Board, by issuing to Franchisees shares of a new series of preferred stock ("Franchisee Preferred"), whose holders are entitled to elect the new director (the "Franchisee Director").
>
> Shareholders request that the Company's amended governing documents provide that:
>
> (i) one share of the Franchisee Preferred should be issued to each Franchisee, for each franchised restaurant;
>
> (ii) consideration for the Franchisee Preferred should be a minimal amount;
>
> (iii) the Franchisee Preferred should be redeemable by the Company at nominal cost when a Franchisee ceases to own a franchised restaurant;
>
> (iv) the Franchisee Preferred should entitle the holder to no amount upon liquidation, termination or dissolution of the Company;
>
> (v) the Franchisee Preferred should not be transferable to anyone other than McDonald's and should not entitle its holder to vote on any matter other than the election of the new Franchisee Director; and
>
> (vi) the Franchisee Preferred holders have the authority to nominate and elect the Franchisee Director, who may be required to satisfy director qualifications applicable generally to independent directors.
>
> This proposal should be implemented in a way that does not violate the terms of any existing agreement.

A copy of the Proposal, including the Supporting Statement, as well as related correspondence from 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 properly excluded from the 2017 Proxy Materials pursuant to:

- Rule 14a-8(i)(7) because the Proposal deals with matters relating to the Company's ordinary business operations;
- Rule 14a-8(i)(2) because the Proposal would cause the Company to violate Delaware law; and
- Rule 14a-8(i)(6) because the Company lacks the power and authority to implement the Proposal.

ANALYSIS

I. The Proposal May Be Excluded Under Rule 14a-8(i)(7) Because It Deals With Matters Related To The Company's Ordinary Business Operations.

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 was 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." The second consideration 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)).

We believe that the Company may exclude the Proposal under Rule 14a-8(i)(7) because it implicates both of these considerations. First, the Proposal relates to the management of the Company's capital structure (namely, the issuance of stock and the terms (including recipients) of such stock), which is precisely the kind of "task" that is "fundamental to management's ability to run a company on a day-to-day basis." Second, the Proposal seeks to micro-manage the Company.

A. *The Proposal May Be Excluded Under Rule 14a-8(i)(7) Because It Relates To The Management Of The Company's Capital Structure.*

The Staff has consistently held that proposals that relate to the management of a company's capital structure—and, more specifically, the issuance of company stock and the terms (including recipients) of such stock—are excludable under Rule 14a-8(i)(7) (and its predecessor, Rule 14a-8(c)(7)) because they relate to a company's ordinary business operations. For instance, in *Bank of America Corp*. (avail. Jan. 10, 2011), the proposal asked the board "to amend the bylaws of the corporation to require majority shareholder approval before the company can authorize and issue additional common shares, until the price of the [c]ompany's common stock closes above $35.00 per share . . . or until the amount of issued and outstanding common stock is brought down and remains below 10 billion shares." The company argued, among other things, that the proposal related to "the management of a [c]orporation's capital structure" and, more specifically, "the issuance of authorized shares of common stock." The Staff agreed with the company's arguments and concurred with the exclusion of the proposal under Rule 14a-8(i)(7), noting that the proposal related "to the authorization and issuance of the company's common stock." *See also Harken Energy Corp*. (avail. Mar. 30, 2001); *NetCurrents, Inc*. (avail. May 3, 2001) (in each case, concurring with the exclusion under Rule 14a-8(i)(7) of a proposal asking that the board adopt a resolution providing for stockholder approval before any of the company's stock could be issued because the proposals concerned "the issuance of authorized shares").

Similarly, in *Consolidated Edison Co. of New York, Inc.* (avail. Mar. 8, 1983), the Staff concurred with the exclusion under then-Rule 14a-8(c)(7) of a proposal directing the company to issue shares of common stock to "every customer which shall have had [an] account with [the company] . . . for ten continuous full years at the previous June 30." The proposal also provided that "[t]he shares so distributed shall have all the rights and privileges of the common shares now outstanding," but then, like the Proposal, proceeded to include several restrictions on such common stock and the recipients of such common stock. The company noted that the Staff had consistently taken the position that proposals relating to the terms on which securities are issued are excludable because they relate to a company's ordinary business operations. The Staff agreed, noting that the proposal related "to the ordinary business operations of the Company (i.e., the terms upon which common stock is to be issued)."

As with the precedent cited above, the Proposal seeks to manage the Company's capital structure by asking the Board of Directors of the Company (the "Board") to take action to authorize and issue a new series of preferred stock of the Company (the "Franchisee Preferred Stock") with specified parameters and features. More specifically, like the proposal in *Bank of America*, the Proposal relates to the "authorization and issuance of the company's . . . stock" (in this case, preferred as opposed to common stock). And like the proposal in *Consolidated Edison*, the Proposal explicitly prescribes the terms (including recipients) of the Franchisee Preferred Stock (e.g., certain "customers" in the case of *Consolidated Edison* and Franchisees (as defined below) in the case of the Proposal).

More generally, the Staff has consistently found a wide range of proposals that, like the Proposal, address other issues related to the management of a company's capital structure and/or the terms on which capital is raised (including establishment of a stock buyback or repurchase program, redemption and conversion of a class of stock, and rounding out fractional shares) are excludable under Rule 14a-8(i)(7) because they, too, relate to matters of ordinary business. For example, in *Astronics Corp.* (avail. Mar. 2, 2001), a proposal to redeem all shares of Class B common stock and convert them to Class A common stock on a one-for-one basis was excludable under Rule 14a-8(i)(7) as "relating to [the company's] . . . ordinary business operations (i.e., the redemption and conversion of Astronics securities)." Similarly, in *Cleco Corp*. (avail. Jan. 21, 2003), a proposal to redeem a class of preferred stock was excludable under Rule 14a-8(i)(7) "as relating to ordinary business operations (i.e., the redemption of Cleco securities)," and in *Medstone International, Inc*. (avail. May 1, 2003), a proposal to implement a common stock repurchase program was excludable under Rule 14a-8(i)(7) "as relating to its ordinary business operations (i.e., implementing a share repurchase program)."

Here, the Proposal asks the Company to issue a new series of preferred stock, the Franchisee Preferred Stock, and then dictates the specific recipients and other terms of that stock, including that (i) the Franchisee Preferred Stock "should entitle the holder to no amount upon liquidation, termination or dissolution of the Company," (ii) the "proposed terms of the Franchisee Preferred [Stock] are intended to provide no financial benefit, such as dividends or a liquidation preference, to holders" (together, the "Financial Restrictions") and (iii) the consideration due for the Franchisee Preferred Stock shall be restricted. Accordingly, as in the foregoing precedent, the Proposal relates to the terms on which capital is raised and the management of the Company's capital structure, which are ordinary business matters that "could not, as a practical matter, be subject to direct shareholder oversight." 1998 Release. For these reasons and consistent with the foregoing Staff precedent, the Proposal may be excluded under Rule 14a-8(i)(7).

B. The Proposal May Be Excluded Under Rule 14a-8(i)(7) Because It Seeks To Micro-Manage The Company.

Moreover, the Proposal impermissibly seeks to micro-manage the Company by requesting that, in order to achieve the goal of Board representation of the "Owner/Operators of McDonald's restaurants who pay royalties to the Company" (referred to in the Proposal and here as the "Franchisees"), the Board issue the Franchisee Preferred Stock with very specific terms. Thus, the Proposal dictates not only the overall method by which to achieve improved Company representation—through the issuance of the Franchisee Preferred Stock granting Franchisees the right to elect a director to the Board—but numerous precise details on exactly how the Proposal is to be implemented, including:

- the proposed recipients of the Franchisee Preferred Stock and how many shares should be issued to each recipient;
- the consideration that should be paid for the Franchisee Preferred Stock;
- the Company's redemption rights associated with the Franchisee Preferred Stock;
- the Financial Restrictions;
- the Franchisee Preferred Stock's transferability; and
- the specific voting rights of the Franchisee Preferred Stock, which limit Franchisee shareholders to only vote on one matter—the election of a particular director.

The Proposal thus seeks to "micro-manage" matters of a complex nature upon which shareholders, as a group, are not in a position to make an informed judgment. Indeed, the Proposal embodies the type of detail that the Commission has stated raises concerns over micro-management because it "involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies." 1998 Release. The Proposal demonstrates the basis for the Commission's determination that such proposals are not proper under Rule 14a-8(i)(7), as the level of detail specified in the Proposal raises a host of issues that shareholders are not well positioned to address through a "For" or "Against" vote on the Proposal. For example, as noted in the Supporting Statement, the Proposal is based on the premise that the creation of a "Franchisee Director" (as defined in the Proposal) position on the Board "could help strengthen the alignment between the Company and its franchisees by ensuring that the perspective of franchisees is fairly represented, and would appropriately provide a voice for these critical stakeholders among McDonald's top policy leadership."

However, neither the Proposal nor the Supporting Statement offers any support for the proposition that the creation of the Franchisee Preferred Stock and a new director position on the Board would be an effective method for increasing Franchisee representation within the Company.

Moreover, the Proposal does not merely introduce an issue and suggest a general outline for addressing that concern. Rather, the Proposal makes the specific determination that not only should Franchisee representation be addressed through the creation of a new series of preferred stock—the Franchisee Preferred Stock—and a new director position, the Franchisee Preferred Stock also must have several specific features associated with it. Even if a new series of preferred stock to achieve the goal allegedly sought by the Proposal were to be created, it would be the province of management, and not of shareholders placing a single "For" or "Against" vote on the Proposal, to determine the specific mechanics of the stock—not the least of which would be determining what *bona fide* financial preference this new series of preferred stock would actually possess.

The Staff has consistently concurred that shareholder proposals that—similar to the Proposal—attempt to micro-manage a company by providing specific details and dictating detailed procedures are excludable under Rule 14a-8(i)(7). In this respect, the Proposal is similar to the proposals that were considered in *Amazon.com, Inc.* (avail. Mar. 20, 2013) and *General Electric Co.* (avail. Jan. 25, 2012, *recon. denied* Apr. 16, 2012). In *Amazon.com*, the proposal called for the company's board to hold a competition for giving public advice on the items in the company's proxy statement to be voted on at its annual meeting. The proposal also specified six "features" to be incorporated into the requested competition. The company successfully argued for exclusion of the proposal under Rule 14a-8(i)(7) because the proposal dictated "not only the overall method by which proxy advisors will be evaluated—through a 'competition'—but also a number of precise details on how the [p]roposal is implemented." The Staff concurred, noting that "the proposal [sought] to micromanage the company to such a degree that exclusion of the proposal" was warranted.

The proposal in *General Electric Co.* recommended that the company's board adopt a highly specific procedure for evaluating director performance. The company argued that the proposal sought to micro-manage the company because "[r]ather than raising a general policy issue and outlining a process for the Company's board to follow in developing and applying that process, the Proposal dictate[d]": (i) the specific date for determining which directors are subject to the evaluation process; (ii) the tenure standard for determining which directors are subject to the evaluation process; (iii) who performs the evaluation process; (iv) what scale is used for evaluating directors, including the high and low end of the scale; (v) the timing of the evaluation process; and (vi) an arbitrary means for resolving certain potential outcomes under the prescribed process. The Staff concurred that such specificity in the proposal amounted to micro-managing the company, and thus that the proposal could be excluded under Rule 14a-8(i)(7). *See also Apple Inc.* (avail. Dec. 5, 2016) (concurring with the exclusion of a proposal that requested that the company's board issue a report setting forth policy options for the company to reach net-zero greenhouse gas emission status by 2030 since the proposal sought to micro-manage the company by imposing a specific time frame and specific quantitative targets to consider when implementing a complex policy); *Deere & Co.* (avail. Dec. 5, 2016) (same); *Marriott International Inc.* (avail. Mar. 17, 2010) (concurring with the exclusion of a shareholder proposal asking to install and test low-flow shower heads in some of the company's hotels because it amounted to micro-managing the company by requiring the use of specific technologies); *Ford Motor Co.* (avail. Mar. 2, 2004) (concurring with the exclusion of a proposal requesting that the company publish a report about global warming/cooling, where the report was required to include details such as the measured temperature at certain locations and the method of measurement, the effect on temperature of increases or decreases in certain atmospheric gases, the effects of radiation from the sun on global warming/cooling, carbon dioxide production and absorption, and a discussion of certain costs and benefits); *Duke Energy Corp.* (avail. Feb. 16, 2001) (concurring with the exclusion of a proposal under Rule 14a-8(i)(7), which recommended that the company's board take steps to reduce nitrogen oxide emissions from the company's coal-fired power plants by 80% and to limit each boiler to 0.15 pounds of nitrogen oxide per million BTUs of heat input by a certain year, where the company argued that the proposal sought to micro-manage the company).

The Proposal contains precisely the types of intricate detail that led the Staff to concur with the exclusion of the proposals discussed above. Like the proposals in *Amazon.com, General Electric* and other Staff precedent discussed above, the Proposal purportedly seeks to advance a specific goal (i.e., give Franchisees the power to elect one new member of the Board) by prescribing a highly specific process to be followed to purportedly achieve this goal. Moreover, some of the features included in the Proposal (such as the Financial Restrictions) are not related to the Proposal's objective of allowing the Franchisees to elect one new member of the Board. Therefore, the Proposal's specific mechanics for the implementation of the Franchisee Preferred Stock, such as the unique privileges and burdens of the stock, restrictions on transferability, voting rights, Financial Restrictions and other details, as previously noted above, amount to an attempt to micro-manage the Company similar to the proposals discussed above. Consistent with the 1998 Release and the foregoing Staff precedent, the Proposal may be excluded under Rule 14a-8(i)(7) as a matter of the Company's ordinary business operations because the Proposal attempts to micro-manage the Company.

II. The Proposal May Be Excluded Under Rule 14a-8(i)(2) Because Implementation Of The Proposal Would Cause The Company To Violate Delaware Law.

Rule 14a-8(i)(2) allows the exclusion of a proposal if implementation of the proposal would "cause the company to violate any state, federal, or foreign law to which it is subject." *See Kimberly-Clark Corp.* (avail. Dec. 18, 2009); *Bank of America Corp.* (avail. Feb. 11, 2009). For the reasons set forth in the legal opinion provided by Morris, Nichols, Arsht & Tunnell LLP regarding Delaware law (the "Delaware Law Opinion"), the Company believes that the Proposal is excludable under Rule 14a-8(i)(2) because implementation of the Proposal would cause the Company to violate Delaware law. A copy of the Delaware Law Opinion is attached to this letter as Exhibit B.

The Proposal asks the Board to take action to authorize and issue the Franchisee Preferred Stock. Under the Proposal, the Franchisee Preferred Stock would be issued only to the Franchisees. In addition, the Proposal includes numerous restrictions to be placed on the terms of the Franchisee Preferred Stock, including the Financial Restrictions (as defined in Section I above). As explained in the Delaware Law Opinion, none of the restrictions included in the Proposal qualifies as a *bona fide* preference for purposes of Delaware law. The sole right of the Franchisee Preferred Stock that is permitted under the terms of the Proposal is the ability of the Franchisees to nominate and vote as a separate class to elect a director to the Board.

However, as discussed in greater detail in the Delaware Law Opinion, a Delaware corporation, such as the Company, cannot issue a series of preferred stock unless the terms of the preferred stock include a *bona fide* preference, such as a preference over the holders of common stock to receive dividends or distributions on a corporate liquidation. As explained in the Delaware Law Opinion, "[d]ividend and liquidation rights are not the only terms that constitute preferences." However, according to the Delaware Law Opinion, "a review of the Proposal reveals that the Franchisee Preferred Stock does not contain *any feature* that qualifies as a *bona fide* preference under Delaware law" and "under Delaware law, the Company cannot issue a series of preferred stock unless the terms of the stock include a preference." (emphasis added). After surveying the applicable provisions of the Delaware law and commentary, counsel that authored the Delaware Law Opinion concludes that "preferences must be financial in nature," and the Financial Restrictions in the Proposal prohibit the Franchisee Preferred Stock from providing any financial benefit (i.e., a preference). Thus, as discussed in the Delaware Law Opinion, because of the Financial Restrictions, "the terms of the Proposal . . . prohibit the Company from including a preference in the Franchisee Preferred." Therefore, under the terms of the Proposal, the Financial Restrictions turn the Franchisee Preferred Stock into a voting stock with no financial benefits, and, as detailed in the Delaware Law Opinion, "*Delaware courts have held that a voting right is not a preference that qualifies a stock as preferred stock under*

Delaware law" (emphasis added). Accordingly, pursuant to the Delaware Law Opinion, implementation of the Proposal would violate Delaware law because the Franchisee Preferred Stock "would not include a *bona fide* preference."

On numerous occasions, the Staff has concurred with the exclusion of shareholder proposals where the proposal, if implemented, would violate state law, according to a legal opinion signed by counsel. For example, in *Bank of America Corp.* (avail. Feb. 11, 2009), the Staff concurred with the exclusion of a proposal to amend a Delaware corporation's bylaws to establish a board committee and authorize the board chairman to appoint members of the committee. The proposal was excluded under Rule 14a-8(i)(2) since Delaware law provides that only the board can appoint members of the board committees; shareholders cannot specify how committee members are to be appointed. *See* 8 Del. C. § 141(c)(2); § 141(a). *See also, e.g.*, *The Goldman Sachs Group, Inc.* (avail. Feb. 1, 2016) (concurring with the exclusion under Rule 14a-8(i)(2) of a proposal that would cause the company to violate Delaware law relating to board committee composition); *AT&T Inc.* (avail. Feb. 12, 2010) (concurring with the exclusion under Rule 14a-8(i)(2) of a proposal which, if approved, would cause the company to violate Delaware law relating to shareholders' ability to act by written consent); *Marathon Oil Corp.* (avail. Feb. 6, 2009) (concurring with the exclusion under Rule 14a-8(i)(2) of a proposal, which, if implemented, would cause the company to violate a fundamental rule of Delaware law relating to discrimination among holders of the same class of stock); *Northrop Corp.* (avail. Mar. 8, 1991) (concurring with the exclusion under the predecessor rule to Rule 14a-8(i)(2) of a proposal requesting the establishment of a position on the company's board of directors to represent the interests of the company's employees and retirees because the proposal would require the new director to act in a manner inconsistent with the fiduciary duty to act in the interest of the company and its shareholders as a whole under Delaware law).

As discussed above and in the Delaware Law Opinion, it is well established under Delaware law that "preferred stock must have *some* bona fide preference over other stock," and preferred stock without a *bona fide* preference is void. *Shintom Co., Ltd. v. Audiovox Corp.*, 888 A.2d 225, 228-30 (Del. 2005). And while the Delaware law does not provide an exclusive list of preferences, as reflected in the Delaware Law Opinion, practitioners agree, and the list of preferences expressly called out by Delaware law confirms, that a valid preference must provide the holder with some *financial and/or economic* right. Here, as confirmed by the Delaware Law Opinion and discussed above, the Proposal creates no conceivable, valid preference for the Franchisee Preferred Stock over other stock and, in fact, prohibits the kind of rights that typically constitute valid preferences by including the Financial Restrictions in the Proposal. In other words, as explained in the Delaware Law Opinion, "the Proposal prohibits the Company from including a preference in the Franchisee Preferred because the Proposal, by its terms, prevents the Company from including financial terms in the stock."

Thus, exclusion of the Proposal under Rule 14a-8(i)(2) is analogous to other situations where the Staff has interpreted a proposal's language in the most logical manner. For example, in *Vail Resorts, Inc.* (avail. Sept. 16, 2011), the Staff concurred with the exclusion of a proposal that sought to amend the company's bylaws to "make distributions to shareholders a higher priority than debt repayment or asset acquisition, and to take all actions necessary to implement such vote." In attempting to refute the company's argument that implementation of the proposal would violate state law, the proponent asserted that the proposal "should be read to accord priority to distributions only 'in the case of discretionary spending from surplus.'" However, that interpretation was not supported by the language of the proposal, which required the company to make distributions before debt repayments. Thus, the Staff concurred with the exclusion under Rule 14a-8(i)(2), noting that "implementation of the proposal would cause Vail to violate state law."

Therefore, we believe that the Proposal is excludable under Rule 14a-8(i)(2) because, as explained in the Delaware Law Opinion and as discussed above, implementation of the Proposal would cause the Company to violate Delaware law.

III. The Proposal May Be Excluded Under Rule 14a-8(i)(6) Because The Company Lacks The Power And Authority To Implement The Proposal.

Rule 14a-8(i)(6) permits a company to exclude a shareholder proposal "[i]f the company would lack the power or authority to implement the proposal." The Company believes that this exclusion applies to the Proposal because the Company lacks the power and authority to implement a proposal that would violate Delaware law. The Staff has concurred on numerous occasions that a company may exclude a proposal under both Rule 14a-8(i)(2) and Rule 14a-8(i)(6) if the proposal's adoption would cause the company to violate state law. *See, e.g., RTI Biologics, Inc.* (avail. Feb. 6, 2012); *NiSource Inc.* (avail. Mar. 22, 2010). As discussed more fully above and in the Delaware Law Opinion, issuing the Franchisee Preferred Stock would violate Delaware law because the Proposal prevents the Company and the Board from turning the Franchisee Preferred Stock into a valid series of preferred stock under the restrictive terms of the Proposal. Therefore, the Company lacks the power and authority under Delaware law to implement the Proposal, and the Proposal is excludable under Rule 14a-8(i)(6) as a result.

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 and the Supporting Statement from its 2017 Proxy Materials.

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 Denise A. Horne, the Company's Corporate Vice President, Associate General Counsel and Assistant Secretary, at (630) 623-3154.

Sincerely,

Elizabeth Ising

Elizabeth A. Ising

Enclosures

cc: Denise A. Horne, McDonald's Corporation
Maureen O'Brien, The Marco Consulting Group Trust I

EXHIBIT A

From: Maureen O'Brien [mailto:obrien@marcoconsulting.com]
Sent: Thursday, December 15, 2016 9:48 AM
To: Corporate Secretary <corporatesecretary@us.mcd.com>
Subject: Shareholder Proposal

Please see attached a shareholder proposal submitted for inclusion in the 2017 proxy statement.

Maureen O'Brien
Director, Corporate Governance

THE MARCO CONSULTING GROUP
550 W. Washington Blvd. Suite 900 ▪ Chicago, IL 60661-2703
Direct: 312-612-8446 ▪ Office: 312-575-9000 ▪ Fax: 312-575-0085
obrien@marcoconsulting.com

THE MARCO CONSULTING GROUP

December 15, 2016

Ms. Gloria Santona
Executive Vice President, General Counsel and Secretary
McDonald's Corporation
Department 010
One McDonald's Plaza
Oak Brook, IL 60523-1928

RE: Marco Consulting Group Trust I

Dear Ms. Santona:

As the duly authorized representative of the Marco Consulting Group Trust I (the "Trust"), I write to give notice that pursuant to the 2016 proxy statement of McDonald's Corporation (the "Company"), the Trust intends to present the attached proposal (the "Proposal") at the 2017 annual meeting of shareholders (the "Annual Meeting"). The Trust requests that the Company include the Proposal in the Company's proxy statement for the Annual Meeting.

A letter from the Trust's custodian documenting the Trust's continuous ownership of the requisite amount of the Company's stock for at least one year prior to the date of this letter is being sent under separate cover. The Trust also intends to continue its ownership of at least the minimum number of shares required by the SEC regulations through the date of the Annual Meeting.

I represent that the Trust or its agent intends to appear in person or by proxy at the Annual Meeting to present the attached Proposal. I declare the Trust has no "material interest" other than that believed to be shared by stockholders of the Company generally.

Please direct all questions or correspondence regarding the Proposal to Maureen O'Brien, Director of Corporate Governance. Ms. O'Brien can be reached at obrien@marcoconsulting.com or 312-612-8446.

Sincerely,

Eileen M Dunbar

Eileen Dunbar
Chief Operating Officer

Enclosure

RESOLVED, that shareholders of McDonald's Corporation ("McDonald's" or the "Company") request that the Board take the necessary steps (including initiating appropriate amendments to the certificate of incorporation and bylaws and excluding those steps that must be taken by shareholders) to adopt a plan to give the Owner/Operators of McDonald's restaurants who pay royalties to McDonald's (hereinafter, "Franchisees") the power to elect one new member of the Board, by issuing to Franchisees shares of a new series of preferred stock ("Franchisee Preferred"), whose holders are entitled to elect the new director (the "Franchisee Director").

Shareholders request that the Company's amended governing documents provide that:

(i) one share of the Franchisee Preferred should be issued to each Franchisee, for each franchised restaurant;

(ii) consideration for the Franchisee Preferred should be a minimal amount;

(iii) the Franchisee Preferred should be redeemable by the Company at nominal cost when a Franchisee ceases to own a franchised restaurant;

(iv) the Franchisee Preferred should entitle the holder to no amount upon liquidation, termination or dissolution of the Company;

(v) the Franchisee Preferred should not be transferable to anyone other than McDonald's and should not entitle its holder to vote on any matter other than the election of the new Franchisee Director; and

(vi) the Franchisee Preferred holders have the authority to nominate and elect the Franchisee Director, who may be required to satisfy director qualifications applicable generally to independent directors.

This proposal should be implemented in a way that does not violate the terms of any existing agreement.

SUPPORTING STATEMENT

Restaurant franchisees create a great deal of value for franchisors and their shareholders. While corporate franchisors provide the overall architecture, marketing and strategic vision for franchisees, franchise restaurants are the main revenue and profit drivers creating shareholder value.

According to McDonald's 2015 annual report, conventional franchisees operated a combined 30,081of McDonald's 36,525 restaurants worldwide. Moreover, the Company provides information on franchised sales in its annual report to shareholders because "management believes they are important in understanding the Company's financial performance." McDonald's acknowledged in the 2015 annual report that "[t]he strength of the alignment among the Company, its franchisees and suppliers … has been key to McDonald's long-term success." Thus, the Company's relationship with franchisees is critical to long-term shareholder value.

Franchisee representation on McDonald's Board could help strengthen the alignment between the Company and its franchisees by ensuring that the perspective of franchisees is fairly represented, and would appropriately provide a voice for these critical stakeholders among McDonald's top policy leadership. Our proposal uses the Franchisee Preferred to provide an independent selection mechanism for the Franchisee Director that would not require membership in any franchisee association or other organization. Our proposed terms of the Franchisee Preferred are intended to provide no financial benefit, such as dividends or a liquidation preference, to holders.

We urge shareholders to vote for this proposal.

BNY MELLON

525 William Penn Place
4th Floor
Pittsburgh, PA 15259

December 16, 2016

By mail and email: corporatesecretary@us.mcd.com

McDonald's Corporation
Attention: Ms. Gloria Santona
Executive Vice President, General Counsel and Secretary
Department 010
One McDonald's Plaza
Oak Brook, IL 60523-1928

RE: Marco Consulting Group Trust I

Dear Ms. Santona:

The Bank of New York Mellon, as custodian of the Marco Consulting Group Trust I, is writing this to verify that as of the close of business December 15, 2016 the Fund held 5,546 shares of MCDONALDS CORP. stock in our account at Depository Trust Company Participant ID 901 and continues to hold them as of the date of this letter. The Fund has held at least 5,298 shares of your Company continuously since December 15, 2015. All during that time period the value of the Fund's shares in your Company was in excess of $2,000.

If there are any other questions or concerns regarding this matter, please feel free to contact me at proxysupport@bnymellon.com or 412-234-5532.

Sincerely,

Angela Zuhl
Vice President
BNY Mellon
Client Service Delivery / Shared Services / Global Securities Services Delivery
Class Actions & Proxy

Telephone: 412-234-7412
E-mail: angela.zuhl@bnymellon.com

EXHIBIT B

Morris, Nichols, Arsht & Tunnell LLP

1201 North Market Street
P.O. Box 1347
Wilmington, Delaware 19899-1347

302 658 9200
302 658 3989 Fax

January 23, 2017

McDonald's Corporation
One McDonald's Plaza
Oak Brook, Illinois 60523

RE: Stockholder Proposal Submitted by The Marco Consulting Group Trust I

Ladies and Gentlemen:

This letter confirms our advice regarding a proposal (the "Proposal") submitted to McDonald's Corporation, a Delaware corporation (the "Company"), from the proponent referenced above (the "Proponent") for inclusion in the Company's proxy materials for its upcoming annual meeting of stockholders. For the reasons explained below, it is our opinion that (1) the Proposal would violate Delaware law if it were implemented and (2) the Company lacks the power and authority to implement the Proposal.

I. The Proposal.

The Proposal asks the Board of Directors of the Company (the "Board") to take action to authorize and issue a new series of preferred stock of the Company, to be designated "Franchisee Preferred." Under the Proposal, the Franchisee Preferred would be issued to certain owners and operators of restaurants who pay royalties to the Company (the "Franchisees").[1]

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[1] The Proposal provides:

RESOLVED, that shareholders of McDonald's Corporation ("McDonald's" or the "Company") request that the Board take the necessary steps (including initiating appropriate amendments to the certificate of incorporation and bylaws and excluding those steps that must be taken by shareholders) to adopt a plan to give the Owner/Operators of McDonald's restaurants who pay royalties to McDonald's (hereinafter, "Franchisees") the power to elect one new member of the Board, by issuing to Franchisees shares of a new series preferred stock ("Franchisee Preferred"), whose holders are entitled to elect the new director (the "Franchisee Director").

Shareholders request that the Company's amended governing documents provide that:

(i) one share of the Franchisee Preferred should be issued to each Franchisee, for each franchised restaurant;
(ii) consideration for the Franchisee Preferred should be a minimal amount;
(iii) the Franchisee Preferred should be redeemable by the Company at nominal cost when a Franchisee ceases to own a franchised restaurant;

(Continued . . .)

The Franchisee Preferred would be a voting stock with no financial benefits. It would provide the Franchisees the right to vote as a separate class to elect a director to the Board. This is the sole right of the Franchisee Preferred. The Proposal mandates that the Franchisee Preferred "should entitle the holder to no amount upon liquidation, termination or dissolution of the Company." The Supporting Statement to the Proposal specifies that the "proposed terms of the Franchisee Preferred are intended to provide no financial benefit, such as dividends or a liquidation preference, to holders." The remaining terms of the Franchisee Preferred are comprised of restrictions intended to ensure that this voting stock is held only by Franchisees. Specifically, the terms of the stock would prohibit a Franchisee from transferring Franchisee Preferred to anyone other than the Company and would provide that the Company would redeem shares of Franchisee Preferred for a nominal cost when a Franchisee ceases to own a franchised restaurant.

II. Summary.

The Delaware Supreme Court has expressly held that a Delaware corporation, such as the Company, cannot issue a series of preferred stock unless the terms of the preferred stock include a bona fide preference, such as a preference over the holders of common stock to receive dividends or distributions on a corporate liquidation. The Proposal requests that the Company issue "a new series of preferred stock," referred to as Franchisee Preferred. The sole right of the Franchisee Preferred is a voting right to elect a director. The Delaware courts have held that a voting right is not a preference that qualifies a stock as preferred stock under Delaware law. Moreover, a survey of the Delaware law reveals that stock preferences are financial in nature. This means that the Proposal prohibits the Company from including a preference in the Franchisee Preferred because the Supporting Statement mandates that the stock confer no financial benefit on the holders of the stock. Accordingly, implementation of the Proposal by issuing the Franchisee Preferred would violate Delaware law because it would not include a bona fide preference.

III. Analysis.

As recently as 2005, the Supreme Court of Delaware reaffirmed the long-standing rule that "The Delaware General Corporation Law requires that preferred stock must have *some*

(. . . continued)

(iv) the Franchisee Preferred should entitle the holder to no amount upon liquidation, termination or dissolution of the Company;

(v) the Franchisee Preferred should not be transferable to anyone other than McDonald's and should not entitle its holder to vote on any matter other than the election of the new Franchisee Director; and

(vi) the Franchisee Preferred holders have the authority to nominate and elect the Franchisee Director, who may be required to satisfy director qualifications applicable generally to independent directors.

This proposal should be implemented in a way that does not violate the terms of any existing agreement.

bona fide preference over other stock."[2] Generally, under Delaware law, a preference means that a class or series of stock is entitled to a right or privilege that other classes or series are not entitled to enjoy.[3] If a stock designated as preferred does not have a preference, it would be a sham security that is invalid.[4] This rule of Delaware law is recognized by practitioners and commentators alike.[5]

The Franchisee Preferred urged by the Proposal does not have a bona fide preference for purposes of Delaware law. It lacks all of the traditional features that would qualify a stock as "preferred." Preferred stocks typically include some preferential right, to the exclusion of the common stock, to be paid a dividend or liquidation distribution:

> The term 'preferred stock' is of fairly definite import. There is no difficulty in understanding its general concept. [I]t is of course a stock which in relation to other classes enjoys certain defined rights and privileges. These rights and privileges are generally associated with specified dividend and liquidation priorities.[6]

The Franchisee Preferred advocated by the Proposal lacks these traditional preferences. The Supporting Statement expressly provides that the Franchisee Preferred should entitle its holders to "no financial benefit, such as dividends or a liquidation preference."

Dividend and liquidation rights are not the only terms that constitute preferences, but a review of the Proposal reveals that the Franchisee Preferred does not contain any feature that qualifies as a bona fide preference under Delaware law. The Proposal requests that the Franchisee Preferred have the right to elect a director to the Board, but voting rights are not preferences under Delaware law. Section 151(a) of the Delaware General Corporation Law (the "DGCL"), the statute that provides the baseline authorization for what features may be included

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2 *Shintom Co., Ltd. v. Audiovox Corporation*, 888 A.2d 225, 230 (Del. 2005) (upholding this rule of law but determining the stock at issue in the case was valid preferred stock because it had a right to a preference payment before the common stockholders received any amounts upon a liquidation of the corporation) (emphasis in original).

3 *See e.g. Starring v. American Hair & Felt Co.*, 191 A. 887, 890 (Del. Ch. 1937), *aff'd*, 2 A.2d 249 (Del. 1937).

4 *See Shintom*, 888 A.2d at 228-230.

5 Drexler, Black & Sparks, *Delaware Corporation Law and Practice*, §17.01 (2016) ("For a corporation to validly issue a class or series of preferred stock, that class or series of stock must have *some* preference over other stock."); American Bar Association, Model Preferred Stock Certificate of Designations For A Public Corporation, Introduction ("[D]elaware case law requires that preferred stock have a preference over common stock, which is typically a preference as to dividends or on liquidation (but need not be a preference as to both).") (hereinafter, "ABA Model Certificate of Designations").

6 *Starring*, 191 A. at 890; *see also Goldman v. Postal Telegraph*, 52 F. Supp. 763 (D. Del. 1943) ("Historically, preferential rights consist generally of two classes of preferences, viz: (1) Preferences as to dividends and (2) preferences in distribution of assets upon liquidation, or winding-up.").

as terms of Delaware corporate stock, makes a clear distinction between "voting powers" on the one hand and "preferences" on the other:

> Every corporation may issue 1 or more classes of stock or 1 or more series of stock within any class thereof, any or all of which classes may be of stock with par value or stock without par value and which classes or series may have *such voting powers*, full or limited, or no voting powers, and *such* designations, *preferences* and relative, participating, optional or other special rights, and qualifications, limitations or restrictions thereof, as shall be stated and expressed in the certificate of incorporation or of any amendment thereto, or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors pursuant to authority expressly vested in it by the provisions of its certificate of incorporation.

Thus, under Section 151(a), "voting powers" are treated as a feature of stock that is separate and distinct from stock "preferences."

This distinction has also clearly been made in the case law. Relying on this language in a predecessor version of Section 151(a), the Court of Chancery in *Starring v. American Hair & Felt Co.* concluded that a class of stock that possessed the exclusive right to vote in director elections did not constitute "preferred stock" for purposes of Delaware law. The Court held that "From this examination of the section [, the predecessor to Section 151(a)], I think the conclusion is inescapable that special powers with respect to voting are not to be catalogued with 'preferences and relative, participating, optional or other special rights.'"[7] Citing the *Starring* case, the Court of Chancery reached the same conclusion in a later decision, *Telvest, Inc. v. Olson*, when it enjoined the issuance of a preferred stock because, among other reasons, the preferred stock had features identical to the common stock except that the preferred stock would have entitled its holders to a supermajority vote on certain mergers and other business combinations.[8] In light of these decisions, it is clear that the voting rights provision of

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[7] 191 A. at 891. The Court in *Starring* was asked to determine whether the class of stock at issue was either "preferred stock" or "special stock" for purposes of Delaware law. Under the provisions of the DGCL in effect at the time of the *Starring* decision, only preferred stock or special stock could be subject to redemption by the corporation. The corporation at issue in *Starring* attempted to amend the terms of its common stock to make the common stock redeemable at the option of the corporation under certain circumstances. By determining that the common stock's exclusive right to elect directors was not a "preference" or "special right," the Court concluded that the common stock could not be amended to include the challenged redemption terms.

[8] 1979 WL 1759, at *5 (Del. Ch. Mar. 8, 1979) (noting that the *Starring* decision "casts some doubt on the proposition that a stock can be classified as 'special' or 'preferred' under § 151 solely because it is given a favored voting position"); *National Education Corporation v. Bell & Howell Company*, 1983 WL 18035, at *4-5 (Del. Ch. Aug. 25, 1983) (written by the same judge as the *Telvest* decision and describing his *Telvest* decision as follows: "[t]he piggyback preferred stock that was to be issued there [, in *Televest*,] was clearly a

(Continued . . .)

the Franchisee Preferred does not qualify as a bona fide preference for purposes of Delaware law.

The Proposal lists out six features, none of which qualifies as a bona fide preference for purposes of Delaware law. We highlight (*in italics*) each of these six features and analyze them below.

> "*(i) one share of the Franchisee Preferred should be issued to each Franchisee, for each franchised restaurant[.]*" This feature is not a preference of the stock. It merely identifies the proposed recipients of the shares and how many shares would be issued to each recipient.
>
> "*(ii) consideration for the Franchisee Preferred should be a minimal amount[.]*" This feature relates solely to the consideration to be paid for the stock, and therefore is not a preference of the stock.
>
> "*(iii) the Franchisee Preferred should be redeemable by the Company at nominal cost when a Franchisee ceases to own a franchised restaurant[.]*" The redemption feature in the Franchisee Preferred is a restriction; it is a burden on the stock that enables the Company to eliminate the voting rights of someone who ceases to be a Franchisee. The Delaware Court of Chancery has held that when stock terms "speak of burdens" on the stock, those terms are not preferences because "the distinguishing characteristic of preferred . . . stock speaks of rights or favors in relation to other stock."[9] This redemption feature clearly is not a right or favor in relation to the Company's common stock (or any other class of stock).[10]

(. . . continued)

sham insofar as it purported to be preferred stock. It carried no real preferences whatever other than a grant of increased voting power.").

In *Telvest*, the board of directors of the corporation at issue attempted to use the authority under its certificate of incorporation to unilaterally create and issue preferred stock to thwart a hostile takeover attempt. The board proposed to distribute to all current common stockholders a series of preferred stock that had economic rights identical to the common stock but that would have entitled the preferred stockholders to an 80% vote on certain mergers with a hostile acquiror. The Court enjoined the issuance of preferred stock relying on several grounds, including that (i) the stock likely was not "preferred stock," (ii) the corporation proposed to issue the stock in a potentially unlawful dividend and (iii) the issuance may have been an inequitable response to the takeover threat posed by the hostile acquiror.

9 *Starring*, 191 A. at 891.

10 It is possible to draft a redemption feature as a bona fide preference. *Shintom*, 888 A.2d at 230 (recognizing that a redemption right can serve as a preference). For example, a redemption feature drafted as a put right that enables the preferred stockholder to require the corporation to redeem the stock at a premium price before any other stock is redeemed or receives distributions would constitute a bona fide preference. This put feature would be a "right" or "favor" benefitting the preferred stockholder. In contrast, the Franchisee Preferred

(Continued . . .)

> "*(iv) the Franchisee Preferred should entitle the holder to no amount upon liquidation, termination or dissolution of the Company[.]*" As noted above, the absence of any rights on liquidation, termination or dissolution supports the conclusion that the Franchisee Preferred does *not* have a bona fide preference.
>
> "*(v) the Franchisee Preferred should not be transferable to anyone other than McDonald's and should not entitle its holder to vote on any matter other than the election of the new Franchisee Directors[.]*" The prohibition on transfer envisioned by this feature is a restriction, not a "right or favor" that constitutes a preference. For the same reasons explained above, the voting features referenced here do not constitute a preference.
>
> "*(vi) the Franchisee Preferred holders have the authority to nominate and elect the Franchisee Director, who may be required to satisfy director qualifications applicable generally to independent directors.*" For the same reasons explained above, the voting features referenced here do not constitute a preference.

No features of the Proposal constitute a preference, and under Delaware law, the Company cannot issue a series of preferred stock unless the terms of the stock include a preference.[11]

In addition to demanding "preferred" stock whose specified terms do not include any preference, the terms of the Proposal also prohibit the Company from including a preference in the Franchisee Preferred. The Supporting Statement to the Proposal specifies that the "proposed terms of the Franchisee Preferred are intended to provide no financial benefit, such as dividends or a liquidation preference, to holders." Delaware practitioners recognize the following four types of features as comprising the list of known preferences that are included in stock terms:

> *(1) A liquidation preference.* Including a liquidation preference in the Franchisee Preferred would entitle the holder to be paid a fixed sum upon a liquidation of the Company before the holders of common stock receive any sums upon a liquidation.[12] As noted above, the express terms of the Proposal forbid any liquidation preference.

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redemption mechanic, which requires the Company to redeem the stock "at nominal cost," is basically a cancellation feature to eliminate voting power, and therefore is not a bona fide preference as required by Delaware law.

11 *See* the discussion of the *Shintom* case above.

12 8 *Del. C.* § 151(d) ("The holders of the preferred or special stock of any class or of any series thereof shall be entitled to such rights upon the dissolution of, or upon any distribution of the assets of, the corporation as shall be stated in the certificate of incorporation or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors as hereinabove provided.").

(Continued . . .)

(2) A dividend preference. Including a dividend preference in the Franchisee Preferred would entitle the holder to certain dividends before any dividends are paid on the common stock of the Company.[13] As noted above, the express terms of the Proposal forbid any dividend preference.

(3) A right to redemption. Including a redemption preference in the Franchisee Preferred would allow the holder to cause the Company to acquire the stock in exchange for paying the stockholder cash, property or securities.[14] Clearly, the right to force the Company to exchange the Franchisee Preferred for cash, property or securities would be a financial benefit, which the Supporting Statement prohibits. As noted, the Proposal does not include such a right to redemption as a financial benefit to the holders of Franchisee Preferred, but rather the redemption mechanic in the Proposal is a restriction that enables the Company to effectively cancel the stock and its voting power.

(4) A conversion right. A preferred stock may include a right to convert the preferred stock into another class or series of stock of the corporation.[15] The Company has outstanding only common stock. The Company's common stock is traded on the New York Stock Exchange; during the past year, the per share trading price has been above $100.00. Clearly, if the Franchisee Preferred were convertible into Company common stock, the right to receive publicly traded common stock would be a financial benefit. Interpreting the Proposal as permitting conversion into common stock would also not be a reasonable interpretation of the Proposal because it would defeat the purpose of the Proposal,

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(. . . continued)

[13] 8 *Del. C.* § 151(c) ("The holders of preferred or special stock of any class or of any series thereof shall be entitled to receive dividends at such rates, on such conditions and at such times as shall be stated in the certificate of incorporation or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors as hereinabove provided, payable in preference to, or in such relation to, the dividends payable on any other class or classes or of any other series of stock, and cumulative or noncumulative as shall be so stated and expressed.").

[14] 8 *Del. C.* § 151(b) ("Any stock which may be made redeemable under this section may be redeemed for cash, property or rights, including securities of the same or another corporation, at such time or times, price or prices, or rate or rates, and with such adjustments, as shall be stated in the certificate of incorporation or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors . . . .").

[15] 8 *Del. C.* § 151(e) ("Any stock of any class or of any series thereof may be made convertible into, or exchangeable for, at the option of either the holder or the corporation or upon the happening of a specified event, shares of any other class or classes or any other series of the same or any other class or classes of stock of the corporation, at such price or prices or at such rate or rates of exchange and with such adjustments as shall be stated in the certificate of incorporation or in the resolution or resolutions providing for the issue of such stock adopted by the board of directors.).

which is to empower Franchisees to own a specific class of stock so that they can elect a director who represents their interests.

These comprise the universe of preferences expressly contemplated by each of the DGCL,[16] the Company's Restated Certificate of Incorporation (the "Certificate")[17] and well-known model preferred stock terms prepared by practitioners and bar organizations.[18] Each of these preferences is financial in nature. Indeed, the foregoing demonstrates that a preference must be financial in nature. Thus, the Proposal prohibits the Company from including a preference in the Franchisee Preferred because the Proposal, by its terms, prevents the Company from including financial terms in the stock.

The Proponent carefully chose the terms of the Franchisee Preferred. The Proponent asked for a series of preferred stock. However, "[t]he Delaware General Corporation Law requires that preferred stock must have *some* bona fide preference over other stock,"[19] and "[p]referred shares that do not comport with the statutory requirements of the Delaware General Corporation law are void."[20] Thus, preferred stock without a preference would be void. Even if the Board and stockholders approved an amendment to the Certificate to create the Franchisee Preferred, the stock would nevertheless be invalid for failure to include a bona fide preference. Accordingly, the Proposal would violate Delaware law if implemented.[21] Furthermore, because

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16 See *8 Del. C.* § 151. The summary of preferences in this opinion is based on the preferences identified in Section 151 of the DGCL. While Delaware law does not provide an exclusive list of what may constitute a preference, no other provision of the DGCL specifies a list of stock terms that constitute preferences of stock.

Companies from time to time issue a series of "poison pill" preferred stock in connection with stockholder rights plans. The rights plans entitle the holders to purchase this poison pill preferred stock. On a change of control or an acquisition of a threshold amount of stock by a hostile party, the rights become exercisable, at an attractive price, for the preferred stock or for common stock of the company. Although this type of preferred stock entitles its holders to voting rights, the voting rights do not qualify the stock as preferred. Instead, poison pill stock may be issued as preferred stock because it includes a dividend or liquidation preference over the holders of common stock. *See Moran v. Household Intern., Inc.*, 500 A.2d 1346, 1352-53 (Del. 1985) (upholding a stockholder rights plan and poison preferred stock as valid, and concluding the preferred stock was valid because it had "superior dividend and liquidation rights" over the common stock).

17 Restated Certificate of Incorporation of the Company, Article FOURTH, Part B, Paragraph (2).

18 *See* ABA Model Certificate of Designations (listing dividend rights, liquidation rights, redemption rights and conversion rights as the preferences of the model preferred stock); National Venture Capital Association Model Certificate of Incorporation, at 4-37 (listing dividend rights, liquidation rights, mandatory and optional conversion rights and redemption rights as the preferences of the model preferred stock).

19 *Shintom*, 888 A.2d at 230 (emphasis in original).

20 *Id.* at 228.

21 Although the Proposal is styled as a request for the Board to take action, the Proposal would violate Delaware law if the Board took the requested action. It is not lawful for stockholders to request the directors take illegal action. *Cf. In re Massey Energy Co.*, 2011 WL 2176479, at *20 (Del. Ch. May 31, 2011) (stating that

(Continued . . .)

the Proposal would violate Delaware law if it were implemented, the Company lacks the power and authority to implement the Proposal.

* * *

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"Delaware corporations [may] only pursue 'lawful business' by 'lawful acts'"); *Guttman v. Huang*, 823 A.2d 492, 506 (Del. Ch. 2003) ("[O]ne cannot act loyally as a corporate director by causing the corporation to violate the positive laws it is obliged to obey.").

IV. Conclusion.

For the reasons discussed in this letter, it is our opinion that (1) the Proposal would violate Delaware law if it were implemented and (2) the Company lacks the power and authority to implement the Proposal.

Very truly yours,

Morris, Nichols, Arsht & Tunnell LLP

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