



DIVISION OF  
CORPORATION FINANCE

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

April 5, 2022

Elizabeth A. Ising  
Gibson, Dunn & Crutcher LLP

Re: McDonald's Corporation (the "Company")  
Incoming letter dated January 23, 2022

Dear Ms. Ising:

This letter is in response to your correspondence concerning the shareholder proposal (the "Proposal") submitted to the Company by SOC Investment Group for inclusion in the Company's proxy materials for its upcoming annual meeting of security holders.

The Proposal urges the board to oversee a third-party audit analyzing the adverse impact of the Company's policies and practices on the civil rights of Company stakeholders, above and beyond legal and regulatory matters, and to provide recommendations for improving the Company's civil rights impact.

We are unable to concur in your view that the Company may exclude the Proposal under Rule 14a-8(i)(7). In our view, the Proposal transcends ordinary business matters.

Copies of all of the correspondence on which this response is based will be made available on our website at <https://www.sec.gov/corpfin/2021-2022-shareholder-proposals-no-action>.

Sincerely,

Rule 14a-8 Review Team

cc: Cornish F. Hitchcock  
Hitchcock Law Firm PLLC

January 23, 2022

**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 SOC Investment Group*  
*Securities 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 2022 Annual Shareholders' Meeting (collectively, the "2022 Proxy Materials") a shareholder proposal (the "Proposal") and statements in support thereof (the "Supporting Statement") submitted by SOC Investment Group (the "Proponent").

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

- filed this letter with the Securities and Exchange Commission (the "Commission") no later than eighty (80) calendar days before the Company intends to file its definitive 2022 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.

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## THE PROPOSAL

The Proposal states, in relevant part:

RESOLVED, that shareholders of McDonald's urge the Board of Directors to oversee a third-party audit analyzing the adverse impact of McDonald's policies and practices on the civil rights of company stakeholders, above and beyond legal and regulatory matters, and to provide recommendations for improving the company's civil rights impact. Input from civil rights organizations, franchisees, corporate and franchise employees, suppliers, and customers should be considered in determining the specific matters to be analyzed.

The Supporting Statement elaborates on this request by alleging that "it is unclear how [the Company] addresses racial inequality" and asserting that a "civil rights audit will help [the Company] identify, remedy and avoid adverse impacts on its stakeholders." The Supporting Statement states that the requested report is necessary in order for the Company "to *obtain a complete picture of how it contributes to social and economic inequality.*" (emphasis added).

A copy of the Proposal and its Supporting Statement, as well as relevant correspondence with the Proponent, is attached to this letter as Exhibit A.

## BASIS FOR EXCLUSION

For the reasons discussed below, we respectfully request that the Staff concur with our view that the Proposal may be excluded from the 2022 Proxy Materials pursuant to Rule 14a-8(i)(7) as relating to the Company's ordinary business operations because the Proposal relates to the Company's litigation strategy and the conduct of ongoing litigation to which the Company is a party.

The Company is presently involved in litigation relating to the very subject matter of the Proposal. In fact, the Supporting Statement explicitly references certain pending lawsuits involving the Company, in each case relevant to the Proposal and requested report, and the Proponent describes the allegations as follows:

- "Lawsuits by 238 current and former Black franchisees<sup>1</sup> describe 'systematic and covert racial discrimination' and denial of 'equal opportunity to success'

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<sup>1</sup> Notably, the Company disputes the accuracy of this statement, including the characterization of these lawsuits.

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from practices steering them to high cost, low volume operations in Black neighborhoods;”<sup>2</sup>

- “Black [Company] executives have sued the [C]ompany alleging disparate treatment based on race;”<sup>3</sup> and
- “A pending lawsuit alleges that while approximately 40% of customers are Black, [the Company’s] tiered advertising budget based on racial stereotypes produces lower spend with Black-owned media groups.”<sup>4</sup>

In addition, the Supporting Statement makes clear that the Proposal defines the term “civil rights” to encompass each of the following by:

- Referring to “civil rights and gender and racial equity;”
- Referencing the Company’s commitment to “‘fair treatment in access, opportunity and advancement for all’, and [its] stated [] aim to ‘dismantle barriers to economic opportunity;”
- Citing to Company statistics on workforce diversity; and
- Referring to “complaints and lawsuits alleging sexual harassment at [C]ompany-owned and franchised McDonald’s outlets.”

In light of the foregoing, and as described below, issuing the report requested in the Proposal would require the Company to take action that would harm its legal defense in multiple pending lawsuits, including because the Proposal seeks an audit and a report on issues that are subject to ongoing litigation and in support of a predetermined adverse conclusion (contrary to the Company’s stated position in such litigation) that the Company’s existing policies and practices “adversely impact” the civil rights of certain stakeholders, including but not limited to employees, franchisees, and their employees, suppliers, and customers (which the Company strongly disputes). As demonstrated in the precedent discussed below, Rule 14a-8(i)(7) permits the exclusion of shareholder proposals like the Proposal that relate to the Company’s legal strategy and thus interfere with the Company’s ordinary business operations.

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<sup>2</sup> This statement appears to reference, in part, *Crawford et al. v. McDonald’s*, No. 1:20-cv-05132 (N.D. Ill.), later referred to in this letter as the “*Crawford Franchisee Litigation*.”

<sup>3</sup> This statement appears to reference *Guster-Hines and Neal v. McDonald’s*, 1:20-cv-00117 (N.D. Ill.), later referred to in this letter as the “*Guster-Hines Litigation*.”

<sup>4</sup> This statement appears to reference *Entertainment Studios Networks, Inc. and Weather Group LLC v. McDonald’s*, No. 2:21-cv-04972 (C.D. Cal.), later referred to in this letter as the “*Allen Media Litigation*.”

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## BACKGROUND

While the Company believes the Proposal should be excluded for the reasons summarized above and covered in more detail below, diversity, equity, and inclusion are top priorities for the Company. Even while the Company defends itself in the litigation referenced in this letter, it continues to take actions to hold itself accountable to public commitments to advance equitable opportunity for its employees, franchisees, and suppliers. Highlights of these commitments include:

- Introducing a global franchisee recruitment initiative to increase the number of franchisees from all backgrounds, including historically underrepresented groups, which includes a five-year, \$250 million investment in the United States to provide alternatives to traditional financing in order to help candidates—who may face socio-economic barriers—join the McDonald’s System;
- Committing to a 10% increase in spending with diverse-owned suppliers between 2020 and 2025, bringing total annual spend to \$3.5 billion;
- Committing to increase marketing spend with diverse-owned media from 4% to 10%, and with Black-owned media from 2% to 5%, of total national advertising spend between 2021 and 2024;
- Implementing Global Brand Standards in all restaurants and offices that are aimed at furthering a culture of physical and psychological safety for employees and customers through the prevention of violence, harassment, and discrimination; and
- Establishing goals to increase the representation of historically underrepresented groups in leadership roles at the Company and linking accountability for the achievement of those goals to executive compensation.

## ANALYSIS

### **The Proposal May Be Excluded Under Rule 14a-8(i)(7) Because It Deals With Matters Relating 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 of 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

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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.” *Id.* (citing Exchange Act Release No. 12999 (Nov. 22, 1976)).

In addition, a shareholder proposal being framed in the form of a request for a report does not change the nature of the proposal. The Commission has stated that a proposal requesting the dissemination of a report may be excludable under Rule 14a-8(i)(7) if the subject matter of the report is within the ordinary business of the company. *See* Exchange Release No. 20091 (Aug. 16, 1983). The Staff, likewise, has indicated that “[where] the subject matter of the additional disclosure sought in a particular proposal involves a matter of ordinary business . . . it may be excluded under rule 14a-8(i)(7).” *Johnson Controls, Inc.* (avail. Oct. 26, 1999).

### ***The Proposal Is Excludable Because It Relates To The Company’s Litigation Strategy And The Conduct Of Litigation To Which The Company Is A Party***

We believe that the Proposal may be excluded from the 2022 Proxy Materials pursuant to Rule 14a-8(i)(7) because the Proposal implicates the Company’s litigation strategy in pending lawsuits involving the Company and therefore relates to the Company’s ordinary business operations. In particular, the Proposal is interested only in finding and disclosing *adverse impacts*, thereby mandating a predetermined outcome for the requested audit and report and increasing the likelihood that the Company could be found liable in pending litigation.

As described below, the Company is presently involved in litigation seeking to hold the Company liable for alleged violations of the Civil Rights Act of 1866, 14 Stat. 27–30 (codified as amended at U.S.C. § 1981 (1991)) (the “Civil Rights Act”)<sup>5</sup> and Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e *et seq.*) (“Title VII”),<sup>6</sup> in addition to violations of state civil rights statutes,<sup>7</sup> including alleged discriminatory treatment of protected classes. The report and analysis requested by the Proposal relate to the very same subject matter: a report “analyzing the *adverse impact* of [the Company’s] policies and practices on the civil rights of [C]ompany stakeholders” (emphasis added).

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<sup>5</sup> Amended Complaint, *Crawford*, Dkt. 30, ¶¶ 222–36 (“*Crawford* Am. Compl.”); Third Amended Complaint, *Entertainment Studios Networks*, Dkt. 45, ¶¶ 120–127 (“*Allen* TAC”).

<sup>6</sup> First Amended Complaint, *Fairley*, Dkt. 18, ¶¶ 165–80 (“*Fairley* Am. Compl.”).

<sup>7</sup> *Allen* TAC at ¶¶ 128–34 (alleging a violation of the Unruh Civil Rights Act, Cal. Civ. Code. § 51.5); *Fairley* Am. Compl. at ¶¶ 181–96 (alleging violations of the Florida Civil Rights Act, Fl. Stat. § 760 (2018)).

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Additionally, the Supporting Statement requests that the Company assess its actions “through a civil rights lens to obtain a complete picture of how it contributes to social and economic inequality.” Moreover, the Proposal assumes—consistent with the plaintiffs’ allegations in the litigation and contrary to the Company’s defenses in the litigation—that there is, in fact, an “adverse impact” or “civil rights impact” of the Company’s policies and procedures on certain stakeholders, including “franchisees, corporate, and franchisee employees, suppliers, and customers.” As a result, requiring the creation and disclosure of the report requested by the Proposal would adversely affect the Company’s litigation strategy and defense in pending lawsuits. Specifically, because the Proposal seeks an audit based on the assumption of adverse impacts, agreeing to conduct the requested audit and report would require the Company to take action (in the form of public disclosures) that would directly contradict its position in the *Crawford Franchisee Litigation*, *Allen Media Litigation*, *Fairley Litigation*,<sup>8</sup> and *Guster-Hines Litigation* regarding alleged violations of civil rights and discriminatory treatment of certain stakeholders constituting protected classes.

The Staff regularly concurs with the exclusion under Rule 14a-8(i)(7) of shareholder proposals that relate to a company’s ordinary business operations, including when the subject matter of the proposal is the same as or similar to the subject matter of litigation in which a company is then involved. See, e.g., *Chevron Corp. (Sisters of St. Francis of Philadelphia et al.)* (avail. Mar. 30, 2021) (“*Chevron 2021*”) (concurring with the exclusion of a proposal requesting a “third-party report...analyzing how [the company’s] policies, practices, and [] impacts of its business, perpetuate racial injustice and inflict harm on communities of color in the United States,” while the company was involved in numerous pending lawsuits seeking to hold the company liable for its alleged role in climate change and the alleged resulting injuries, including the alleged harmful impacts of climate change on communities of color); *Walmart Inc.* (avail. Apr. 13, 2018) (concurring with the exclusion of a proposal requesting a report on risks associated with emerging public policies on the gender pay gap while the company was involved in numerous pending lawsuits regarding gender-based pay discrimination and related claims before the U.S. Equal Employment Opportunity Commission, as “affect[ing] the conduct of ongoing litigation relating to the subject matter of the [p]roposal to which the [c]ompany is a party”); *General Electric Co.* (avail. Feb. 3, 2016) (concurring with the exclusion of a proposal requesting a report assessing all potential sources of liability related to PCB discharges in the Hudson River while the company was defending multiple pending lawsuits related to its alleged past release of chemicals into the Hudson River); *Chevron Corp.* (avail. Mar. 19, 2013) (concurring with the exclusion of a proposal requesting that the company review its “legal initiatives against investors” because “[p]roposals that would affect the conduct of ongoing litigation to which the

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<sup>8</sup> *Fairley and Reddick v. McDonald’s*, 1:20-cv-02273 (N.D. Ill.) is referred to in this letter as the “*Fairley Litigation*.”

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company is a party are generally excludable”); *Johnson & Johnson* (avail. Feb. 14, 2012) (concurring with the exclusion of a proposal where implementation would have required the company to report on any new initiatives instituted by management to address the health and social welfare concerns of people harmed by LEVAQUIN®, thereby taking a position contrary to the company’s litigation strategy); *Reynolds American Inc.* (avail. Mar. 7, 2007) (concurring with the exclusion of a proposal requesting that the company provide information on the health hazards of secondhand smoke, including legal options available to minors to ensure their environments are smoke free, while the company was defending several cases alleging injury as a result of exposure to secondhand smoke and a principal issue concerned the health hazards of secondhand smoke); *AT&T Inc.* (avail. Feb. 9, 2007) (concurring with the exclusion of a proposal requesting that the company issue a report containing specified information regarding the alleged disclosure of customer records to governmental agencies, while the company was defending multiple pending lawsuits alleging unlawful acts related to such disclosures); *Reynolds American Inc.* (avail. Feb. 10, 2006) (concurring with the exclusion of a proposal requesting that the company notify African Americans of the unique health hazards to them associated with smoking menthol cigarettes, which would be inconsistent with the company’s pending litigation position of denying such health hazards); *Exxon Mobil Corp.* (avail. Mar. 21, 2000) (concurring with the exclusion of a proposal requesting immediate payment of settlements associated with the Exxon Valdez oil spill as relating to litigation strategy); *Philip Morris Companies Inc.* (avail. Feb. 4, 1997) (concurring with the exclusion of a proposal where the Staff noted that although it “has taken the position that proposals directed at the manufacture and distribution of tobacco-related products by companies involved in making such products raise issues of significance that do not constitute matters of ordinary business,” the proposal “primarily addresses the litigation strategy of the [c]ompany, which is viewed as inherently the ordinary business of management to direct”).

Similar to the precedents described above, the Proposal involves the same subject matter as, and implicates the Company’s defense and litigation strategy in, pending lawsuits involving the Company. Specifically, the Company is defending several ongoing lawsuits seeking to hold the Company liable for its alleged role in perpetrating and/or facilitating discriminatory practices against protected classes. As described above, the Proposal requires an assessment of an assumed “adverse impact of [the Company’s] policies and practices on the civil rights of [C]ompany stakeholders,” and directly relates to discrimination against protected classes. Each of these pending lawsuits involve, among other causes of actions, private civil rights claims by Company stakeholders that rely on allegations that would be directly implicated by the report requested in the Proposal, as evidenced by the complaints filed in each lawsuit.

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The first category of relevant litigation the Company is defending against involves the protected class of race. The report requested by the Proposal would directly impact these pending lawsuits:

- The *Crawford Franchisee Litigation* involves Black former franchisees alleging a violation of the Civil Rights Act of 1866, premised on facts purporting to demonstrate the Company discriminated against Black franchisees by steering them to less profitable franchise locations and depriving them of equal opportunities.<sup>9</sup>
- The *Allen Media Litigation* involves Black-owned media companies alleging violations of the Civil Rights Act of 1866, and the Unruh Civil Rights Act, Cal. Civ. Code. § 51.5, premised on facts purporting to demonstrate that the Company discriminates against such media companies by denying them equal contracting opportunities.<sup>10</sup>
- The *Guster-Hines Litigation* involves two former Company employees alleging violations of the Civil Rights Act of 1866 and Title VII, premised in part on allegations that the Company engaged in a pattern and practice of discriminating against Black franchisees, and then harassing and retaliating against the two plaintiffs/former employees when they spoke out against such discrimination.<sup>11</sup>

The second category of relevant litigation the Company is defending against involves the protected class of gender.

- The *Fairley Litigation* involves two current and former employees of a corporate-owned and operated McDonald's restaurant in Florida alleging violations of Title VII and the Florida Civil Rights Act, Fl. Stat. § 760 (2018), premised on facts purporting to demonstrate that the Company discriminated against female employees, fostered a hostile work environment, and retaliated when employees who were allegedly sexually harassed reported the conduct.<sup>12</sup>

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<sup>9</sup> For example, the plaintiffs allege that “[the Company] instituted discriminatory policies... that negatively and disproportionately impacted Black franchisees.” *Crawford* Am. Compl. at ¶ 160.

<sup>10</sup> For example, the plaintiffs’ allegations include that the Company “refuses to advertise on [plaintiffs’] lifestyle networks because they are owned by an African Americans.” *Allen* TAC at ¶ 21.

<sup>11</sup> For example, the plaintiffs allege that “[o]ver the years, [the Company] engaged in systemic but covert racial discrimination harming African American executives.” *Guster-Hines* TAC at ¶ 4.

<sup>12</sup> For example, the plaintiffs allege that “[t]he work environment at the [Company] restaurant that female workers were forced to endure was permeated with sexual harassment so severe or pervasive as to

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This litigation is brought as a putative class action seeking to represent certain current and former employees across all corporate-owned and operated McDonald's restaurants in Florida.

Each of these lawsuits targeting the Company's alleged discriminatory treatment of protected classes remains ongoing and, to date, there has been no adverse judgment against the Company in any of these matters. Further, some of these lawsuits are currently at the pleading stage while others are in the early discovery stage, and disclosure of the kind of information requested by the Proposal at these stages could have an impact on the Company's defense. The Company's management has a responsibility to defend the Company's interests against unwarranted litigation, which it is committed to doing in each of these cases. A shareholder proposal that interferes with this obligation is inappropriate, particularly when the Company is involved in pending litigation on the very issues that form the basis for the Proposal. Moreover, the Proposal would obligate the Company to take a public position outside the context of pending litigation and the discovery process with respect to the alleged impacts of its existing policies and practices on civil rights and in turn the impact this has on Black and female employees, which goes to the very heart of allegations underlying the pending litigation. It would also potentially compel the Company to disclose assessments regarding the existence and nature of any such impacts, which may prematurely disclose the Company's litigation strategy to its opposing parties in pending litigation and prejudice the Company's position in such cases. For that reason, as explained above, the Staff consistently views shareholder proposals that implicate a company's litigation conduct or litigation strategy as excludable under Rule 14a-8(i)(7).

Here, the Proposal asks that the report include disclosures in support of a predetermined conclusion that the Company's existing policies and practices do have an adverse impact on people and communities of color and other protected classes: namely, by seeking a report "*analyzing the adverse impact* of [the Company's] policies and practices on the civil rights of [C]ompany stakeholders" (emphasis added). Since the requested report would require identification and public disclosure of *adverse impacts* of the Company's policies and practices on the civil rights of a broad group of stakeholders (specifically including franchisees, employees, customers, and suppliers), the report itself could be construed as an implied admission in the above-referenced litigation. This is further evidenced by the Supporting Statement's assertion that the requested report "will help [the Company] identify, remedy, and avoid adverse impacts on its stakeholders." Any such report—especially given that the Proposal incorrectly presumes that the Company is engaged in conduct that has "adverse impact[s]... on the civil rights of [its] stakeholders"—would contravene the Company's position in the above-referenced

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make the restaurant an objectively abusive and hostile workplace for women, thereby altering the terms of their employment." *Fairley* Am. Compl. at ¶ 105.

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litigation by conceding an element that the plaintiffs need to prove in litigation and that the Company disputes, and thus would undermine the Company's defense on the merits.

Where a proposal asks a company to concede an action or consequence that would directly harm the company in pending litigation, the Staff has consistently concurred with the exclusion of a proposal pursuant to Rule 14a-8(i)(7). For example, this was the case recently in *Chevron 2021*, where the Staff recently concurred with the exclusion of a proposal requesting a "third-party report...analyzing how [the company's] policies, practices, and [] impacts of its business, perpetuate racial injustice and inflict harm on communities of color in the United States." The proposal in *Chevron 2021* presumed that the requested report would find that the company facilitated racial injustice and had an adverse impact on communities of color, just as the Proposal here presumes that the Company is having an adverse impact on the civil rights of stakeholders. Similar to *Chevron 2021*, where the proposal left no room for the possibility that the requested analysis and report might find positive impacts from the company's policies, practices, and operations, here too, the Proposal forecloses the possibility that the requested third-party audit might identify a vast number of positive diversity, equity, and inclusion initiatives and other programs and practices of the Company that facilitate and promote civil rights, including for the benefit of communities the Company serves and stakeholders at large.

The Proposal is interested only in finding and disclosing adverse impacts, thereby mandating a predetermined outcome for the requested audit and report. The foregoing is in contrast to the proposal in *The Walt Disney Co. (Butterfield)* (avail Jan. 19, 2022), where the Staff was unable to concur with exclusion under Rule 14a-8(i)(7) based on litigation strategy. In *Disney*, the proposal requested a report on median and adjusted pay gaps across race and gender, including associated risks. In its no-action request, the company argued that it was subject to "a lawsuit by ten current and former employees of the [c]ompany purporting to represent a class alleging female employees were not paid fairly compared to male employees." Notably, however, the proposal in *Disney* was neutrally worded and was not limited to seeking disclosure of only adverse or harmful information regarding the company's pay practices. In contrast, the report requested by the Proposal assumes and *only seeks disclosure pertaining to adverse impacts*. As demonstrated in precedent like *Chevron 2021*, *Walmart Inc.*, *General Electric Co.*, and *Johnson & Johnson*, it is not proper for Rule 14a-8 to be used to require the Company to commission a report designed to increase the likelihood that it will be found liable in pending litigation. Such a proposal harms the Company's legal defense in the aforementioned litigation matters and thus interferes with the Company's ordinary business operations.

As demonstrated above, the Proposal seeks reporting that would directly interfere with the Company's position in these lawsuits by, among other things, addressing the

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Company's impact on the civil rights of stakeholders. As such, the subject of the very report that is requested by the Proposal is in dispute in the pending litigation involving the Company, as each of the plaintiffs in the *Crawford Franchisee Litigation*, *Allen Media Litigation*, and *Guster-Hines Litigation* asserts, among other things, a cause of action for a violation of civil rights, which requires the plaintiffs to prove "intent to discriminate on the basis of race by the defendant," and that the protected categorization is the "but-for cause of [plaintiffs'] injury."<sup>13</sup> The same is true for the plaintiffs who allege a Title VII claim in the *Fairley Litigation*.<sup>14</sup> For example, the plaintiffs in the *Crawford Franchisee Litigation*, *Allen Media Litigation*, and *Guster-Hines Litigation* all allege that the Company's policies and practices have an adverse impact on Black stakeholders. The plaintiffs in each case are asking the court to consider the Company's policies and practices in determining whether the Company's conduct caused injury, and specifically as it relates to the Company's alleged violations of civil rights as described in the aforementioned pending lawsuits. The Proposal requests that the Company commission a report on this very subject matter.

As a final matter, we note that a proposal relating to ordinary business matters such as ongoing litigation is excludable under Rule 14a-8(i)(7) regardless of whether or not it touches upon a significant policy issue. Although the Commission has stated that "proposals relating to such [ordinary business] matters but focusing on sufficiently significant social policy issues (e.g., significant discrimination matters) generally would not be considered to be excludable," the Staff has expressed the view that proposals relating to both ordinary business matters and significant social policy issues may be excluded in their entirety in reliance on Rule 14a-8(i)(7). As an example, although significant discrimination matters and climate change are often considered to be significant policy issues, as noted above, just eight months ago the Staff concurred with the exclusion of a proposal similar to the Proposal that requested a third-party report analyzing how the company's policies, practices and operations "perpetuate racial injustice and inflict harm on communities of color," because the subject matter of the report was the same as the subject matter at the heart of pending litigation matters to which the company was party. *See Chevron 2021*. As a further example, although smoking is often considered a significant policy issue, the Staff has concurred with the exclusion of proposals that touched upon this issue where the subject matter of the proposal (e.g., the health effects of smoking) was the same as or similar to that which was at the heart of litigation in which the company was then involved. *See, e.g., Philip*

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<sup>13</sup> *See, e.g.* Order, *Entertainment Studios Networks*, Dkt. 38 at 2 (citations omitted).

<sup>14</sup> *N.A.A.C.P.*, 866 F. 2d at 167 ("[e]vidence of adverse impact of a challenged practice alone is... sufficient to sustain [an action] under title VII of the Civil Rights Act of 1964"); *see* Memorandum Opinion and Order, *Fairley*, Dkt. 50 at 22 (requiring plaintiffs to plead a "pattern and/or practice of maintaining a hostile work environment and [that defendant] retaliated against those who complained about sex discrimination and harassment").

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*Morris Companies Inc.* (avail. Feb. 4, 1997) (noting that although the Staff “has taken the position that proposals directed at the manufacture and distribution of tobacco-related products by companies involved in making such products raise issues of significance that do not constitute matters of ordinary business,” the company could exclude a proposal that “primarily addresses the litigation strategy of the Company, which is viewed as inherently the ordinary business of management to direct”). Here, the subject matter of the Proposal (e.g., a report on the “adverse impact of [the Company’s] policies and practices on the civil rights of [C]ompany stakeholders”) similarly encompasses the subject matter of litigation in which the Company is currently involved. Thus, because the Proposal implicates the Company’s litigation strategy, which is an ordinary business matter, and notwithstanding that it may raise a significant policy issue, the Proposal is excludable under Rule 14a-8(i)(7).

In summary, the Proposal requests that the Company take action that would directly undermine the Company’s position in pending litigation against the Company at the same time that the Company is defending against plaintiffs’ claims. In this regard, the Proposal seeks to substitute the judgment of shareholders for that of the Company by requiring the Company to take action that would harm its legal defense in pending litigation. Thus, implementing the Proposal would intrude upon Company management’s exercise of its day-to-day business judgment with respect to pending litigation in the ordinary course of its business operations. Accordingly, and consistent with long-standing precedent, we believe that the Proposal may be properly excluded from the 2022 Proxy Materials under Rule 14a-8(i)(7) as relating to the Company’s ordinary business operations.

## CONCLUSION

Based upon the foregoing analysis, we respectfully request that the Staff concur that it will take no action if the Company excludes the Proposal from the 2022 Proxy Materials.

# GIBSON DUNN

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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](mailto: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 Austin Arnett, the Company's Senior Counsel, at (312) 544-9653.

Sincerely,



Elizabeth A. Ising

Enclosures

cc: Austin Arnett, McDonald's Corporation  
Dieter Waizenegger, SOC Investment Group

**EXHIBIT A**

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**From:** Cynthia Simon [REDACTED]  
**Sent:** Monday, November 22, 2021 11:10 AM  
**To:** Corporate Secretary [REDACTED]  
**Cc:** Dieter Waizenegger [REDACTED]  
**Subject:** Submission of Shareholder Proposal for 2022 Annual meeting

Dear Ms. Ralls-Morrison:

Attached please find a shareholder proposal with cover letter that SOC Investment Group is submitting for the 2022 annual meeting.

Please confirm receipt of this email and the two attachments.

Kind regards,

Cynthia Simon

**Cynthia Simon**

ESG Analyst & Engagement Specialist | SOC Investment Group

[REDACTED]

[socinvestmentgroup.com](https://socinvestmentgroup.com) | [@socinvgrp](https://twitter.com/socinvgrp)

November 22, 2021

Via Email: [REDACTED]

Ms. Desiree Ralls-Morrison  
Corporate Secretary  
McDonald's Corporation  
110 N. Carpenter St.  
Chicago, IL 60607

Re: Shareholder proposal for 2022 Annual Shareholder Meeting

Dear Ms. Ralls-Morrison:

The SOC Investment Group is submitting the attached proposal (the "Proposal") pursuant to the Securities and Exchange Commission's Rule 14a-8 to be included in the proxy statement of McDonald's Corporation (the "Company") for its 2022 annual meeting of shareholders.

The SOC Investment Group has continuously beneficially owned, for at least 3 years as of the date hereof, at least \$2,000 worth of the Company's common stock. Verification of this ownership will be sent under separate cover. The SOC Investment Group intends to continue to hold such shares through the date of the Company's 2022 annual meeting of shareholders.

The Proposal requests that the Company's board oversee a civil rights audit analyzing the impact of the Company's policies and practices on the civil rights of stakeholders, including franchisees, corporate and franchise employees, suppliers, and customers of the Company's products. We support this proposal because we believe that McDonald's and its shareholders could benefit from an objective third-party assessment of actions on the civil rights of its stakeholders, particularly in light of issues related to sexual harassment, racial justice, and the disparate impact of the COVID-19 pandemic on women and people of color.

The SOC Investment Group is available to meet with the Company in person or via teleconference on December 3, 2021 between 2:00-4:00 pm or December 10, 2021 from 2:00-5:00 pm central time.

I can be contacted at [REDACTED] or by email at [REDACTED] to schedule a meeting. Please feel free to contact me with any questions.

Sincerely,



Dieter Waizenegger  
Executive Director

RESOLVED, that shareholders of McDonald's urge the Board of Directors to oversee a third-party audit analyzing the adverse impact of McDonald's policies and practices on the civil rights of company stakeholders, above and beyond legal and regulatory matters, and to provide recommendations for improving the company's civil rights impact. Input from civil rights organizations, franchisees, corporate and franchise employees, suppliers, and customers should be considered in determining the specific matters to be analyzed. A report on the audit, prepared at reasonable cost and omitting confidential or proprietary information, should be publicly disclosed on McDonald's website.

#### SUPPORTING STATEMENT

Recently, the racial justice movement and the disproportionate impacts of COVID-19 have focused the public's and policy makers' attention on civil rights and gender and racial equity. McDonald's says diversity, inclusion and equal empowerment are deeply rooted in its brand and underpin its success. Following the 2020 racial justice protests, it committed to "fair treatment in access, opportunity and advancement for all", and stated an aim to "dismantle barriers to economic opportunity."

Yet, it is unclear how McDonald's addresses racial inequality, as it reports diversity data only for US company-owned restaurants and staff, excluding an estimated 660,000 US franchise workers.<sup>i</sup> McDonald's states that 72% of company-owned restaurant workers belong to historically underrepresented groups, but members of these groups hold only 29.1% of US leadership roles. McDonald's does not disclose the extent or impact of any advancement training for its low wage restaurant crew workers. Inadequate wages, wage theft, lack of comprehensive sick leave, and health and safety risks have led to strikes and lawsuits by McDonald's workers. More than 50 complaints and lawsuits alleging sexual harassment at company-owned and franchised McDonald's outlets have been filed since 2016.

Lawsuits by 238 current and former Black franchisees describe "systematic and covert racial discrimination" and denial of "equal opportunity to success" from practices steering them to high cost, low volume operations in Black neighborhoods. Black McDonald's executives have sued the company alleging disparate treatment based on race. The cases are pending.

A pending lawsuit alleges that while approximately 40% of customers are Black, McDonald's tiered advertising budget based on racial stereotypes produces lower spend with Black-owned media groups. McDonald's states that diverse-owned media represents 4%, and Black-owned media 2%, respectively, of advertising spend.

A civil rights audit will help McDonald's identify, remedy, and avoid adverse impacts on its stakeholders. We urge McDonald's to assess its behavior through a civil rights lens to obtain a complete picture of how it contributes to social and economic inequality.

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<sup>i</sup> McDonald's website states that at end 2020, "more than 2 million people worked at franchised McDonald's restaurants globally." McDonald's reports 13,025 US franchises, or 33% of total restaurants systemwide. Attributing US franchise workers to global workers based on this same proportion implies 660,000 workers. See McDonald's 2020 Form 10-K, p. 20.

**HITCHCOCK LAW FIRM PLLC**  
5614 CONNECTICUT AVENUE, N.W. • NO. 304  
WASHINGTON, D.C. 20015-2604  
(202) 489-4813 • FAX: (202) 315-3552

CORNISH F. HITCHCOCK  
E-MAIL: CONH@HITCHLAW.COM

10 February 2022

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

By electronic mail: [shareholderproposals@sec.gov](mailto:shareholderproposals@sec.gov)

Re: Shareholder proposal to McDonald's Corporation  
from SOC Investment Group

Dear Counsel:

This is a response on behalf of the SOC Investment Group to a letter ("McDonald's Letter") from counsel for McDonald's Corporation ("McDonald's" or the "Company") dated 24 January 2021. In that letter McDonald's states its intent to omit the Investment Group's shareholder proposal (the "Proposal") from McDonald's 2022 proxy materials. For the reasons below, we respectfully ask the Division to advise McDonald's that the Division does not concur with the Company's view that the Proposal may be excluded from McDonald's proxy materials.

The Proposal

The Proposal asks McDonald's to conduct a "civil rights audit" of the sort that shareholders have requested at various companies in recent years. The text of the Proposal reads:

RESOLVED: that shareholders of McDonald's urge the Board of Directors to oversee a third-party audit analyzing the adverse impact of McDonald's policies and practices on the civil rights of company stakeholders, above and beyond legal and regulatory matters, and to provide recommendations for improving the company's civil rights impact. Input from civil rights organizations, franchisees, corporate and fran-

chise employees, suppliers, and customers should be considered in determining the specific matters to be analyzed. A report on the audit, prepared at reasonable cost and omitting confidential or proprietary information, should be publicly disclosed on McDonald's website.

The Supporting Statement notes how the racial justice movement and the disproportionate impacts of COVID-19 have focused the public's and policy makers' attention on civil rights and gender and racial equity. The Statement acknowledges McDonald's statements following the 2020 racial justice protests regarding the company's commitment to "fair treatment in access, opportunity and advancement for all", and an aim to "dismantle barriers to economic opportunity." The Statement adds, however, that it is unclear how McDonald's addresses racial inequality, as it reports diversity data only for U.S. company-owned restaurants and staff, excluding the estimated 660,000 U.S. franchise workers who are the mainstay of its workforce. In addition, historically underrepresented groups represent 72% of US company-owned restaurant workers, but hold 29.1% of U.S. leadership roles. McDonald's states its ambition to provide training and education for all but limits advancement training to corporate workers.

The Supporting Statement then proceeds to discuss how McDonald's has been the subject of several types of litigation – and McDonald's makes these cases the centerpiece of its no-action request. Specifically:

- Complaints and lawsuits alleging sexual harassment at corporate-owned and franchised McDonald's outlets have been filed since 2016.
- Pending suits by 238 current and former Black franchisees describe "systematic and covert racial discrimination" and denial of Equal opportunity to success" from practices steering them to high cost, low volume operations in Black neighborhoods, as well as cases by Black McDonald's executives alleging disparate treatment based on race.
- A pending case alleging that while approximately 40% of customers are Black, McDonald's tiered advertising budget based on racial stereotypes produces lower spend with Black-owned media groups.

The Supporting Statement notes also the value of a civil rights audit in promoting gender equity, citing 50 complaints and lawsuits since 2016 that allege sexual harassment at company-owned and franchised McDonald's outlets. The Supporting Statement concludes: "A civil rights audit will help McDonald's identify, remedy, and avoid adverse impacts on its stakeholders. We urge McDonald's to assess its behavior through a civil rights lens to obtain a complete picture of how it contributes to social and economic inequality."

The Company's argument for excluding this Proposal rests on the "ordinary business" exemption in Rule 14a-8(I)(7), and we answer that argument below.

### Discussion

McDonald's argument rests on a mischaracterization of what the Proposal is seeking. The McDonald's Letter leans heavily on rhetoric such as a claim that the Proposal "is interested only in finding and disclosing *adverse impacts*, thereby mandating a predetermined outcome for the requested audit and report and increasing the likelihood that the Company could be found liable in pending litigation." Company Letter at p. 5 (emphasis in original letter). Before explaining why the charge is inaccurate, we offer these preliminary points.

The key language in the Proposal is in many respects the same as or similar to language in proposals that were voted last year with strong shareholder support, particularly for a first-time proposal. Three such proposals survived no-action challenges on "ordinary business" grounds other than the "litigation strategy" argument advanced here.<sup>1</sup>

The only proposal as to which relief was granted on "litigation strategy" grounds was one submitted to Chevron, seeking a report on how Chevron's policies and practices "perpetuate racial injustice and inflict harm on communities of color" and notes that Chevron's existing policies "do not address how systemic racism is

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<sup>1</sup> A 2021 proposal to JPMorgan Chase from CTW Investment Group sought a "racial equity audit analyzing JPMorgan's adverse impacts on nonwhite stakeholders and communities of color" (emphasis added). No-action relief was denied at *JPMorgan Chase* (26 March 2021) (chart), and the proposal received a 40.5% "yes" vote. Page35-36 of the no-action correspondence sets out the text of the proposal. See <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2021/ctwjpmorgan032621-14a8.pdf>.

A 2021 proposal to Amazon from the New York State Common Retirement Fund sought a "racial equity audit analyzing Amazon's impacts on civil rights, equity, diversity and inclusion, and the impacts of those issues on Amazon's business." No-action relief was denied at *Amazon.com, Inc.* (26 March 2021) (chart), and the proposal received a 44.1% "yes" vote. Pages 18-19 of the no-action correspondence set out the text of the proposal, see <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2021/nyscrfamazon040721-14a8.pdf>,

A 2021 proposal to Johnson & Johnson from Christopher and Anne Elliger (through Trillium Asset Management) sought an audit "to assess the *racial impact of the company's policies*, practices, products and services; and to provide recommendations for improving the company's racial impact." No-action relief was denied at *Johnson & Johnson* (12 February 2021) (chart), and the proposal received 33.9% "yes" vote. See <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2021/nyscrfamazon040721-14a8.pdf>.

replicated through its business.”<sup>2</sup> A fair reading of Chevron’s letter, we submit, suggests that Chevron’s primary objection was to this sort of accusatory rhetoric.

Be that as it may, the result in *Chevron* does not warrant the same result here because of important textual differences between that proposal and this one, as we discuss in Part A below, and because the proponent in *Chevron* did not advance arguments we present in Parts B and C. In Part D we respond to and distinguish the decisions upon which McDonald’s argument relies.

A. McDonald’s argument overlooks a key element of the Proposal, and the experience at other companies indicates that such audits involve issues beyond litigation and legal or regulatory compliance.

McDonald’s ignores a key element in the Resolved clause, which seeks an audit of “the adverse impact of McDonald’s policies and practices on the civil rights of company stakeholders, *above and beyond legal and regulatory matters*” (emphasis added). Such language appears nowhere in the *Chevron* resolution discussed above, and it is an important qualification.

The McDonald’s Letter never explains how the requested audit can affect the company’s litigation strategy when the text of the Resolved clause is explicitly focused on issues “above and beyond” the sort of items McDonald’s cites. To be specific, the Proposal is intended to address practices that may not be illegal, but, as a result of implicit or unconscious bias, can skew results in ways that are discriminatory or not aligned with the Company’s professed commitment to racial equity. In recent years, for example, concerns have focused on artificial intelligence and algorithmic bias that may yield results favoring one group over another.<sup>3</sup>

The template for this Proposal is a series of audits conducted at three leading companies, Facebook, Airbnb and Starbucks, and the reports involving those companies suggest that the subject matter will cover matters having little or no

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<sup>2</sup> The text of the resolution appears at pp. 21-22 of the correspondence in *Chevron Corp.* (30 March 2021) (Sisters of St. Francis of Philadelphia), <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2021/stfrancischevron033021-14a8.pdf>.

<sup>3</sup> World Economic Forum, *Research shows AI is often biased. Here’s how to make algorithms work for all of us*, <https://www.weforum.org/agenda/2021/07/ai-machine-learning-bias-discrimination/>; Brookings Institution, *Algorithmic bias detection and mitigation: Best practices and policies to reduce consumer harms* (22 May 2019), <https://www.brookings.edu/research/algorithmic-bias-detection-and-mitigation-best-practices-and-policies-to-reduce-consumer-harms/>.

connection to issues of liability or damages in the sort of litigation McDonald's cites.<sup>4</sup> If anything, and as we discuss in more detail in part B below, such an audit can assist a company in handling litigation.

- The Starbucks audit, led by former U.S. Attorney General Eric Holder, was precipitated by the April 2018 arrest of two African-American men, who were seated in a Philadelphia Starbucks waiting for a business meeting to begin. The audit was commissioned "to review and evaluate Starbucks' multifaceted approach to creating an inclusive and equitable work environment for partners and a welcoming third place for customers."<sup>5</sup> Mr. Holder noted that while the two arrests "may not have been the result of explicit racial animus, the arrests demonstrated powerfully that unaddressed implicit bias can sometimes produce outcomes that are difficult to distinguish from those motivated by conscious racism."<sup>6</sup>

- At Airbnb the focus was on ways to address the potential for bias and discrimination that may inhere in Airbnb's basic business model, which was summarized as:

Hosts create profiles for themselves and their property, choose their own price and availability, and set guidelines for guests. Hosts and guests learn about each other through past reviews and personal communication through the Airbnb platform. Guests and hosts use Airbnb to confirm travel dates and expectations, and make and receive payments. After the stay, both hosts and guests leave reviews for one another, which are public for all future hosts and guests to read.<sup>7</sup>

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<sup>4</sup> The auditor in two of the cases discussed here published a report under the aegis of the Leadership Conference on Civil and Human Rights and the Ford Foundation that explained the rationale for the sort of audit recommended here. Laura W. Murphy, *The Rationale for and Key Elements of a Business Civil Rights Audit* (2021), <http://www.civilrightsdocs.info/pdf/reports/Civil-Rights-Audit-Report-2021.pdf>

<sup>5</sup> *A Report to Starbucks: An Examination of Starbucks' Commitment to Civil Rights, Equity, Diversity, and Inclusion* at 11 (Jan. 2019), <http://stories.starbucks.com/uploads/2019/01/Covington-Report-to-Starbucks-Jan-23-2019.pdf>. This 2019 report was followed by a later assessment, *A Report to Starbucks on the Progress of its Efforts to Promote Civil Rights, Equity, Diversity, and Inclusion* (2020), <http://stories.starbucks.com/uploads/2020/02/Starbucks-Civil-Rights-Assessment-2020-Update.pdf>.

<sup>6</sup> *Id.* at 5.

<sup>7</sup> *Airbnb's Work to Fight Discrimination and Build Inclusion: A Report Submitted to Airbnb* at 2 (2016), [http://blog.atairbnb.com/wp-content/uploads/2016/09/REPORT\\_Airbnbs-Work-to-Fight-Discrimination-and-Build-Inclusion.pdf](http://blog.atairbnb.com/wp-content/uploads/2016/09/REPORT_Airbnbs-Work-to-Fight-Discrimination-and-Build-Inclusion.pdf).

- The Facebook audit focused on ways that Facebook’s site could be used to advance voter suppression, organized hate against minorities and white supremacy.<sup>8</sup>

B. McDonald’s argument ignores the company’s own statements.

The McDonald’s Letter seems to be arguing that there is no evidence of any wrongdoing by the Company and that the Proposal “is interested only in finding and disclosing *adverse impacts*, thereby mandating a predetermined outcome” that will increase “the likelihood that the Company could be found liable in pending litigation.” Company Letter at p. 5 (emphasis in original letter).

Consider, however, various statements that the Company has made since the events of the summer of 2020.

- “While we’re proud of the steps we’ve taken to ensure this so far, we know we still have a lot of work to do.
- “We know there’s a lot of work ahead (but it is work we welcome).<sup>9</sup>
- “These insights [from EEO-1 data, consumer insights, customer trends and expected demographic changes] made it clear we need to strengthen our representation to better reflect the communities and customers we serve.”<sup>10</sup>
- “We also have to acknowledge that some people in our own System feel like they haven’t been given a fair opportunity. We’ve got to face up to that fact and do better.”<sup>11</sup>

These acknowledgments that McDonald’s must “do better” on racial equity is thus a theme that McDonald’s has consistently sounded in the news media. For example, in a July 2020 interview with *The Wall Street Journal*, CEO Chris Kempczinski

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<sup>8</sup> *Facebook’s Civil Rights Audit: Final Report* at 6-8 (2020), <https://about.fb.com/wp-content/uploads/2020/07/Civil-Rights-Audit-Final-Report.pdf>

<sup>9</sup> *Diversity, Equity and Inclusion* (2021), <https://corporate.mcdonalds.com/corpmcd/our-purpose-and-impact/jobs-inclusion-and-empowerment/diversity-and-inclusion.html>.

<sup>10</sup> *Id.*

<sup>11</sup> *Global Diversity, Equity & Inclusion: Elevating Voices and Driving Action with Accountability* (30 July 2020), <https://corporate.mcdonalds.com/corpmcd/en-us/our-stories/article/ourstories.global-diversity.html>.

commented on a decline in the number of store owners and top managers by noting that black employees and franchisees remain represented in the same proportions as before. Even so, he added:

“We absolutely have more work to do.”<sup>12</sup>

Given statements of this sort, one would have thought that any company claiming that it has “work to do” on equity issues would welcome independent civil rights audit. As we explain in the next section, a civil rights audit could help with that “work” as well as a company’s litigation strategy.

C. McDonald’s claims of interference with pending litigation are overblown.

The McDonald’s Letter discusses some of the pending discrimination cases mentioned in the Supporting Statement and argues that publication of the results of an audit would interfere with the Company’s ability to litigate those cases and would contradict the Company’s positions in litigation. McDonald’s Letter at pp. 5-9. We answer as follows.

*First*, using the United States Courts’ PACER system, we have reviewed the dockets in the four cases that McDonald’s cites, and all four of the cases are at an extremely early stage of litigation, *i.e.*, at the motion to discuss stage. In only one such case has an answer been filed.<sup>13</sup>

Moreover, because these cases are in their very early stages, there is very little that an audit could “contradict.” The Company’s statements so far are a combination of general denials and bland comments affirming the Company’s commitment to diversity, equity and inclusion.

- Responding to the *Crawford* case, McDonald’s told USA Today:

“These allegations fly in the face of everything we stand for as an organization and as a partner to communities and small business owners around the world,” McDonald’s said in a statement to USA TODAY.

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<sup>12</sup> Heather Haddon, *McDonald’s, A Pioneer on Diversity, Finds Itself Under Fire*, THE WALL STREET JOURNAL (8 September 2020).

<sup>13</sup> The cited cases and their status as of 9 February 2022 are:

- *Crawford et al. v. McDonald’s*, No. 1:20-cv-05132 (N.D. Ill.) (motion to dismiss pending);
- *Guster-Hines and Neal v. McDonald’s*, No. 1:20-cv-00117 (N.D. Ill.) (answer filed);
- *Entertainment Studios Networks, Inc. and Weather Group LLC v. McDonald’s*, No. 2:21-cv-04972 (C.D. Cal.) (“*Allen Media*”) (motion to dismiss pending);
- *Fairley v. McDonald’s Corp.*, No. 1:20-cv-02273 (N.D. Ill.) (answer filed, discovery cutoff in September 2022).

“Not only do we categorically deny the allegations that these franchisees were unable to succeed because of any form of discrimination by McDonald’s, we are confident that the facts will show how committed we are to the diversity and equal opportunity of the McDonald’s System, including across our franchisees, suppliers and employees.”<sup>14</sup>

- The response to the *Guster-Hines* case was: “While we disagree with the characterizations in the complaint, we are currently reviewing it and will respond to the complaint accordingly.”<sup>15</sup>

- As to the *Allen Media* case, involving the Company’s advertising practices, the company issued a release after its initial motion to dismiss was denied stating: “This case is about revenue, not race, and plaintiffs’ groundless accusations ignore McDonald’s legitimate business reasons for not investing more on their channels and the company’s collaboration with diverse-owned partners.”<sup>16</sup>

- Responding to the filing of the *Fairley* case, McDonald’s stated: “McDonald’s has always been committed to ensuring that our employees are able to work in an environment that is free from all forms of discrimination and harassment.” The Company added: “The plaintiffs’ allegations of harassment and retaliation were investigated as soon as they were brought to our attention, and we will likewise investigate the new allegations that they have raised in their complaint.”<sup>17</sup>

*Second*, and more significantly, the McDonald’s Letter misperceives how the requested audit would function and how, as a practical matter, the audit can actually help the company, both as a matter of company policy and in responding to any existing suits.

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<sup>14</sup> *More than 50 former Black franchisees allege racial discriminatory practices against McDonald’s in new federal lawsuit*, USA TODAY (1 September 2020), <https://www.usatoday.com/story/money/business/2020/09/01/mcdonalds-faces-racial-discrimination-lawsuit-black-franchisees/3448562001/>.

<sup>15</sup> Heather Haddon, *Two McDonald’s Executives Allege Racial Discrimination*, THE WALL STREET JOURNAL (7 January 2020).

<sup>16</sup> *Judge OKs Byron Allen’s \$10 billion racial discrimination lawsuit against McDonald’s*, BLACK ENTERPRISE (26 January 2022), <https://www.blackenterprise.com/judge-oks-byron-allens-discrimination-lawsuit-against-mcdonalds-fast-food-chain/>.

<sup>17</sup> *McDonald’s Workers File \$500 Million Sex Harassment Suit*, BLOOMBERG LAW (13 April 2020), <https://news.bloomberglaw.com/daily-labor-report/mcdonalds-florida-workers-file-500-million-sex-harassment-suit>.

The Company's argument appears to rest on the notion that the auditor's role will be adversarial. Not so, any more than a financial auditor reviewing the company's books automatically assumes an adversarial position. Experience suggests that companies tend to view questions of equity and discrimination as matters involving legal issues and compliance issues. That is too narrow a perspective, and indeed, that is why the Proposal recommends that the auditor should focus on equity issues "above and beyond legal and regulatory compliance," as was discussed *supra* at p. 4.

If anything, an audit of the sort being proposed here can actually help a company faced with litigation of the sort cited in the McDonald's Letter. The point is illustrated by the recent civil rights audits discussed above (at pp. 4-6).

- Airbnb was targeted by California fair housing regulators after a 2015 report indicated that guests with "distinctively African-American names" were 16 percent less likely to secure a booking than guests presumed to be white. The civil rights audit there occurred while the investigation was underway, and it allowed Airbnb to negotiate a settlement with the regulators.<sup>18</sup>

Similarly, Starbucks commissioned its civil rights audit at a time when the company was facing a challenge to its promotions practices from the Equal Employment Opportunity Commission. The Starbucks audit helped that company in 2021 to resolve litigation over practices between 2007 and 2011 and to move forward with new policies to promote workforce equity and compliance.<sup>19</sup>

And indeed, with increased public awareness of how these audits work, a company's willingness to conduct such an audit may be helpful in convincing regulators and litigants that the company is serious about addressing equity issues.

In this regard also, we note that the McDonald's Letter objects (at pp. 6, 9) to the fact that the Proposal seeks to compel public disclosure of the equity report, a step that McDonald's fears could harm the Company's litigation position. Again, this misperceives what is being proposed.

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<sup>18</sup> KPCC, *CA to begin anti-discrimination testing of Airbnb hosts* (17 July 2017), <https://archive.kpcc.org/news/2017/07/17/73858/ca-to-begin-anti-discrimination-testing-of-airbnb/>.

<sup>19</sup> CNBC, *Starbucks strikes deal with EEOC over alleged racial bias in promoting employees* (31 March 2021), <https://www.cnbc.com/2021/03/31/starbucks-reaches-deal-with-eoc-over-alleged-racial-discrimination.html>.

Unlike proposals with a hard-and-fast deadline (*e.g.*, seeking a report by the next year's annual meeting), the Proposal here makes no such demand. The omission is deliberate. Because the proposed audit will inevitably involve a dialogue between the auditor and management, which dialogue will inevitably include the timing of any release. Given these factors, it cannot be said that the publication of an audit report will somehow come out of nowhere and spring an unpleasant surprise on the company's litigation teams.

D. The authorities cited by McDonald's do not support no-action relief.

The no-action decisions cited by McDonald's surely have no application when, as here, the Proposal is focused on practices "above and beyond legal and regulatory compliance." Despite the lack of relevance, we respond as follows.

A "litigation strategy" defense generally applies to a proposal that "would affect the conduct of ongoing litigation to which the company is a party." *Chevron Corp.* (19 March 2013). Situations where the argument has prevailed (including those cited in the McDonald's Letter) tend to involve situations with most or all of these characteristics:

- • The proposal reflects an attempt by shareholders (either subtly or overtly) to steer a case towards a desired result or strategy.<sup>20</sup>
- • The proposal addresses questions of the company's fault or legal liability involving past actions of the company and is not forward-looking.<sup>21</sup>

<sup>20</sup>*Exxon Mobil Corp.* (21 March 2000) (requesting immediate payment of settlements associated with the Exxon Valdez oil spill litigation); *Microsoft Corp.* (15 September 2000) (proposal asking the registrant to sue the federal government); *CMS Energy Corp.* (23 February 2004) (asking CMS to void any agreements with two former executives and claw back money paid to them); *NetCurrents, Inc.* (8 May 2001) (asking the company to sue certain executives over financial irregularities); *Benihana National Corp.* (13 September 1991) (seeking a board report analyzing claims asserted in pending litigation); *Philip Morris Companies, Inc.* (4 February 1997) (asking company to conform to FDA regulations the company is challenging in court) *AT&T Inc.* (9 February 2007) (seeking report on legal and ethical aspects of sharing customer information with FBI and NSA when AT&T is facing litigation on that topic and cannot confirm or deny the facts publicly).

<sup>21</sup> *General Electric Co.* (3 February 2016) (seeking a report to quantify GE's liabilities associated with discharging PCBs into the Hudson River, a topic in multiple pending cases with potentially significant liabilities); *Johnson & Johnson* (14 February 2012) (requesting a report on initiatives to address health and other concerns of consumers who used a J&J product and are suing the company over adverse impacts caused by that product); *AT&T*, *supra* note 20 (seeking report on a topic AT&T cannot disclose publicly); *Walmart Inc.* (13 April 2018) (report on gender pay gap issues would have constituted an admission in a number of pending discrimination cases) (discussed at pp. 11-13 of correspondence available at <https://www.sec.gov/divisions/corpfin/cf-noaction/14a-8/2018/jacobs041318-14a8.pdf>).

- • The proposal involves litigation targeting a significant aspect of a company's business, the outcome of which could have a significant impact on the company's operations.<sup>22</sup> Indeed, a number of the cases that McDonald's cites involved proposals to tobacco companies during far-reaching litigation involving that industry in the in the 1990s and 2000s.<sup>23</sup>

Consideration of these qualitative factors is important because publicly traded companies such as McDonald's are frequently involved in litigation in the ordinary course of business. Thus, the mere fact that a company may be a defendant in a case or cases involving the subject matter of a proposal is not sufficient grounds for excluding the proposal as affecting a company's litigation strategy absent a more direct showing of how specific harm would occur in specific cases. No such showing has been made here.

Moreover, McDonald's ignores contrary authorities, including the rejection last year of virtually the same word-for-word legal arguments against a separate proposal on a separate topic in *Amazon.com, Inc.* (9 April 2021) (CTW Investment Group) (chart) (pending litigation not a basis to exclude a proposal on oversight of risks related to anti-competitive practices), And the Division denied relief to a tobacco company with thousands of cases pending against it when the proposal asked the company to inform poor and less well-educated tobacco users of tobacco users "of the health consequences of smoking" and information about "smoking cessation materials." *Lorillard, Inc.* (3 March 2014).

### Conclusion

For these reasons, the SOC Investment Group respectfully ask the Division

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<sup>22</sup> *Walmart Inc.* (13 April 2018), *supra* note 21, at pp. 24-25 (referring to the *Dukes* case, an employment discrimination case where a trial court certified a nation-wide class of all past and present female employees; after the Supreme Court decertified the nation-wide class, numerous new class actions were filed at the state and local levels, and employees at 49 states complained to the Equal Employment Opportunity Commission).

<sup>23</sup> *Reynolds American Inc.* (7 March 2007) (proposal asked a tobacco company to make available the company's "own clear statement" regarding the hazards of second-hand smoke at a time when the company was appealing a court order that the company issue "corrective communications" on five topics, including the "adverse health effects of exposure to secondhand smoke"); *Reynolds American Inc.* (10 February 2006) (proposal to notify African Americans of the health hazards of menthol cigarettes that were unique to that community at a time when the company challenging those marketing practices); *Philip Morris Companies Inc.*, *supra* note 20.

to advise McDonald's that the Division does not concur that the Proposal may be omitted under Rule 14a-8(i)(7).

Thank you for your consideration of these points. Please feel free to contact me if any additional information would be helpful.

Respectfully submitted,

A handwritten signature in black ink that reads "Cornish F. Hitchcock". The signature is written in a cursive style with a long horizontal flourish at the end.

Cornish F. Hitchcock

cc: Elizabeth Ising