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

DIVISION OF
CORPORATION FINANCE

April 3, 2024

Ning Chiu
Davis Polk & Wardwell LLP

Re: McDonald's Corporation (the "Company")
Incoming letter dated January 23, 2024

Dear Ning Chiu:

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

The Proposal requests that the Company amend its bylaws to include specified requirements for fixing the compensation of directors.

There appears to be some basis for your view that the Company may exclude the Proposal under Rule 14a-8(i)(2). We note that in the opinion of Delaware counsel, implementation of the Proposal would cause the Company to violate state law. Accordingly, we will not recommend enforcement action to the Commission if the Company omits the Proposal from its proxy materials in reliance on Rule 14a-8(i)(2). In reaching this position, we have not found it necessary to address the alternative bases for omission upon which the Company relies.

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/2023-2024-shareholder-proposals-no-action.

Sincerely,

Rule 14a-8 Review Team

cc: John Chevedden

Davis Polk

Davis Polk & Wardwell LLP
450 Lexington Avenue
New York, NY 10017

January 23, 2024

VIA ELECTRONIC SUBMISSION

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

Ladies and Gentlemen:

On behalf of McDonald's Corporation, a Delaware corporation (the "**Company**"), and in accordance with Rule 14a-8(j) under the Securities Exchange Act of 1934, as amended (the "**Exchange Act**"), we are filing this letter with respect to the shareholder proposal (the "**Proposal**") submitted by John Chevedden (the "**Proponent**") for inclusion in the proxy materials the Company intends to distribute in connection with its 2024 Annual Meeting of Shareholders (the "**2024 Proxy Materials**"). The Proposal is attached hereto as Exhibit A.

We hereby request confirmation that the Staff of the Division of Corporation Finance (the "**Staff**") will not recommend any enforcement action if, in reliance on Rule 14a-8, the Company omits the Proposal from the 2024 Proxy Materials.

In accordance with relevant Staff guidance, we are submitting this letter and its attachments to the Staff through the Staff's online Shareholder Proposal Form. In accordance with Rule 14a-8(j), we are simultaneously sending a copy of this letter and its attachments to the Proponent as notice of the Company's intent to omit the Proposal from the 2024 Proxy Materials. This letter constitutes the Company's statement of the reasons it deems the omission of the Proposal to be proper. We have been advised by the Company as to the factual matters set forth herein.

THE PROPOSAL

The Proposal states:

> The Bylaws of McDonald's Corporation are amended as follows:
>
> Article III, Section 9. is deleted and replaced in its entirety as follows:
>
> Compensation **–** No employee of the Corporation shall receive any additional compensation or remuneration for serving as a member of the Board of Directors. Members of the Board of Directors who are not otherwise employed by the Corporation may receive such compensation only as determined in this Section. The Board of Directors shall not have any authority to fix the compensation of directors. The compensation of directors the corporation pays shall be fixed at $1 in a fiscal year; provided, however, the corporation may pay, grant, or award compensation greater than $1 in a fiscal year if such compensation has been (1) disclosed to stockholders in advance of the fiscal year in which the corporation will pay, grant, or award such compensation; (2) submitted to an approval vote of stockholders at an annual or special meeting of stockholders in advance of the fiscal year in which the

corporation will pay, grant, or award such disclosed compensation; and (3) approved by a majority of stockholders votes present in person or represented by proxies and entitled to vote cast in favor of the disclosed annual compensation at an annual or special meeting of stockholders in advance of the fiscal year in which the corporation will pay, grant, or award such compensation, which majority shall include only stockholder votes of stockholders that are not directors of the Company.

REASON FOR EXCLUSION OF THE PROPOSAL

Background

The resolution of the Proposal to amend the Company's Bylaws is binding upon shareholder approval. If adopted, the Proposal could immediately amend the Company's Bylaws and prohibit the Company's Board from providing any compensation to directors of more than $1 per year unless, among other requirements, the compensation is approved by a "majority of stockholders votes" at a shareholders' meeting "*in advance* of the fiscal year" (emphasis added) in which the Company will pay, grant or award such director compensation. Given that no such vote has been taken yet, if the Proposal is adopted, then the Board could need to cease paying any directors for their service, including director compensation previously approved by the Board and for services already rendered by the time of the 2024 Annual Meeting of Shareholders.

The Company believes that the Proposal may be properly omitted from the 2024 Proxy Materials pursuant to:

1. Rule 14a-8(i)(2): Implementation of the Proposal would cause the Company to violate Delaware law;

2. Rule 14a-8(i)(6): The Company lacks the power and authority to implement the Proposal; and

3. Rule 14a-8(i)(7): The Proposal deals with matters related to the Company's ordinary business operations by seeking to micromanage the Company.

The Proposal May Be Excluded under Rule 14a-8(i)(2) Because Implementation of the Proposal Would Cause the Company to Violate Delaware Law.

The Company believes it may omit the Proposal pursuant to Rule 14a-8(i)(2) because implementing the Proposal would require the Company to violate the "one vote for each share" default standard under Delaware law. The Company is incorporated in Delaware. As described above, the Proposal is a binding resolution that could immediately amend the Company's Bylaws if approved by shareholders. 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.* (Dec. 18, 2009); *Bank of America Corp.* (Feb. 11, 2009). As further discussed below and in the legal opinion provided by Morris, Nichols, Arsht & Tunnell LLP regarding Delaware law (the "**Delaware Law Opinion**"), the Proposal is excludable under Rule 14a-8(i)(2). A copy of the Delaware Law Opinion is attached to this letter as Exhibit B.

Under Section 212(a) of the Delaware General Corporation Law (the "**DGCL**"), unless otherwise provided in the Company's certificate of incorporation, "each stockholder shall be entitled to one vote for each share of capital stock held by such stockholder." Given that the Company has not otherwise so provided in its certificate of incorporation, the Proposal would cause the Company to violate Section 212(a). As noted in the Delaware Law Opinion, "each stockholder" includes each director who holds common stock.

However, the Proposal requires that the requested shareholder vote on director compensation "shall include only stockholder votes of stockholders that are not directors of the Company." The supporting statement also emphasizes that "stock owned by Directors will not count in the vote, so the vote result represents the independent views of stockholders." Because the Company's certificate of incorporation does not contain any provision opting out of the "one vote for each share" default rule in Section 212(a) of the DGCL, implementation of the Proposal would violate Delaware law because it would divest shareholders who are directors of their voting rights in the context of the authorization by shareholders of director compensation under the Proposal.

The Staff has consistently permitted the exclusion of a shareholder proposal that would cause a company to violate the "one vote for each share" rule under applicable state law. For example, in *Quotient Technology Inc.* (May 6, 2022), the Staff allowed the exclusion of a proposal requesting that the board of directors disqualify all shares owned and/or controlled by both current and former named executive officers from voting to approve a proposed tax benefits preservation plan. The company argued that the adoption of that proposal would cause the company to violate Section 212(a) of the DGCL by depriving the relevant officers of their right to "one vote for each share"—the same argument set forth herein and in the Company's Delaware Law Opinion. *See also eBay Inc.* (Apr. 1, 2020) (permitting the exclusion of a proposal requesting that the company allow employees to elect a specified percentage of the board, which similarly would have required the company to violate Section 212(a) of the DGCL by causing shareholders to no longer have one vote for each share); and *Dominion Resources, Inc.* (Jan. 14, 2015) (concurring with the exclusion of a proposal that requested a director be appointed by the board without a shareholder vote in violation of the one vote for each share rule under Virginia law).

As described above and in the Delaware Law Opinion, the Proposal, once approved, would cause the Company to violate the DGCL. Therefore, the Company believes that the Proposal is excludable under Rule 14a-8(i)(2).

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) allows a company to exclude a proposal if the company would lack the power or authority to implement the proposal. As described above, the Proposal would, if implemented, cause the Company to violate Delaware law. The Staff has on numerous occasions permitted exclusion under Rule 14a-8(i)(6) of proposals that would cause the company to violate the law of the jurisdiction of its incorporation. *See Arlington Asset Investment Corp.* (April 23, 2021) (permitting exclusion of a proposal that would violate Virginia law); *eBay Inc.* (April 1, 2020) (permitting exclusion of a proposal that would violate Delaware law); *Trans World Entertainment Corp.* (May 2, 2019) (permitting exclusion of a proposal that would violate New York law); *IDACORP, Inc.* (March 13, 2012) (permitting exclusion of a proposal that would violate Idaho law); *NiSource Inc.* (March 22, 2010) (permitting exclusion of a proposal that would violate Indiana law); *Schering-Plough Corp.* (March 27, 2008) (permitting exclusion of a proposal that would violate New Jersey law); *AT&T, Inc.* (Feb. 19, 2008) (permitting exclusion of a proposal that would violate Delaware law); *Noble Corp.* (Jan. 19, 2007) (permitting exclusion of a proposal that would violate Cayman Islands law).

In addition, the Company believes it may omit the Proposal pursuant to Rule 14a-8(i)(6) because adopting the Proposal would require the Company to breach its contractual obligations under its existing director compensation programs. Effective immediately upon shareholder approval, the Proposal would prohibit the Company from awarding annual compensation to directors greater than $1 unless the compensation is approved by a majority of shareholder votes *in advance of* the fiscal year in which such compensation will be paid, granted or awarded. Accordingly, the Board could be required to cease any

payment of director compensation that was already approved by the Board and for services already rendered, which could expose the Company to suit for breach of contract, tortious interference or other contract performance-related claims.

The Staff has consistently taken the position that "proposals that would result in the company breaching existing contractual obligations may be excludable under […] rule 14a-8(i)(6) […] because implementing the proposal […] would not be within the power or authority of the company to implement." Staff Legal Bulletin No. 14B (Sept. 15, 2004). *See also, e.g., Cigna Corporation* (Jan. 24, 2017) (expressing the view that a proxy access proposal that would violate the interim operating covenants of a merger agreement to which the company was a party could be excluded under Rule 14a-8(i)(6)); and *Comcast Corporation* (Mar. 17, 2010) (expressing the view that a proposal regarding an equity holding requirement policy for executives that conflicted with existing contracts between the company and such executives could be excluded as drafted under Rule 14a-8(i)(6)).

As in *Comcast*, neither the Company's Board nor the Company has the authority to implement the Proposal as written because it would result in a breach of the Company's existing compensation programs. Share equivalents of the Company's stock are awarded as part of director compensation under the Company's Directors' Deferred Compensation Plan (the "**DDCP**"), pursuant to which directors "shall receive" restricted stock units for "such amount as may be determined by the Board" (see Section 3.2).[1] Grants will have been approved (and not yet awarded) under the DDCP by the time of the 2024 Annual Meeting of Shareholders. The Board has also approved other forms and types of director compensation that will not have been paid yet by the time of the 2024 Annual Meeting of Shareholders. Implementing the Proposal would effectively require the Company to repudiate obligations to pay both cash compensation and grants of share equivalents under the DDCP that have been previously approved.

Therefore, the Company believes that the Proposal is properly excludable under Rule 14a-8(i)(6).

The Proposal May Be Excluded under Rule 14a-8(i)(7) Because the Proposal Deals with Matters Related to the Company's Ordinary Business Operations.

The Company believes it may omit the Proposal pursuant to Rule 14a-8(i)(7) because it seeks to micromanage the Company by imposing specific methods on the Board and removing their discretion from the determination of director compensation. Rule 14a-8(i)(7) allows a company to omit a shareholder proposal from its proxy materials if such proposal deals with a matter relating to the company's ordinary business operations. The policy underlying the ordinary business exception is based on two central considerations: (i) 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" and (ii) the "degree to which the proposal seeks to 'micromanage' the company by probing too deeply into matters of a complex nature upon which shareholders, as a group, would not be in a position to make an informed judgment." Exchange Act Release No. 34-40018 (May 21, 1998) (the "**1998 Release**"); *see also* Staff Legal Bulletin No. 14L (Nov. 3, 2021) ("**SLB 14L**"). The 1998 Release further states that "[t]his consideration may come into play in a number of circumstances, such as where the proposal involves intricate detail, or seeks to impose specific time-frames or methods for implementing complex policies."

[1] Available at https://www.sec.gov/Archives/edgar/data/63908/000006390822000011/mcd-12312021xex10a10xk.htm.

The Proposal Seeks to Micromanage the Company by Imposing Specific Methods for Determining Director Compensation.

In SLB 14L, the Staff clarified that the determination of whether a proposal impermissibly micromanages the Company "will focus on the level of granularity sought in the proposal and whether and to what extent it inappropriately limits discretion of the board or management." The Staff further clarified that this approach is "consistent with the Commission's views on the ordinary business exclusion, which is designed to preserve management's discretion on ordinary business matters but not prevent shareholders from providing high-level direction on large strategic corporate matters." Consistent with that approach, the Staff has consistently concurred with the exclusion of proposals that inappropriately limit management's discretion. *See, e.g., The Kroger Co.* (Apr. 25, 2023) (concurring with exclusion of a proposal requesting the company pilot participation in the Fair Food Program for tomato purchases in order to mitigate severe risks of forced labor and other human rights violations in the company's produce supply chain); *Amazon.com, Inc.* (Apr. 7, 2023) (concurring that a proposal requiring the company to measure and disclose scope 3 greenhouse gas emissions from its full value chain and all products that it sells directly and by third party vendors micromanaged the company); *Chubb Limited* (Mar. 27, 2023) (concurring with the exclusion of a proposal that would require the board to adopt and disclose a policy for the timebound phase out of underwriting risks associated with new fossil fuel exploration and development projects); and *AT&T Inc.* (Mar. 15, 2023) (concurring with exclusion of a proposal requesting the board adopt a policy of obtaining shareholder approval for any future "golden coffin" arrangements).

The micromanagement element of the ordinary business exception under Rule 14a-8(i)(7) is also based on whether a proposal probes matters "too complex" for shareholders, as a group, to make an informed judgment. SLB 14L, citing the 1998 Release. According to SLB 14L, in making this determination as to whether a proposal probes matters "too complex" for shareholders, the Staff may consider "the sophistication of investors generally on the matter, the availability of data, and the robustness of public discussion and analysis on the topic," as well as "references to well-established national or international frameworks when assessing proposals related to disclosure, target setting, and timeframes as indicative of topics that shareholders are well-equipped to evaluate."

The Staff has consistently concurred with the exclusion of proposals restricting the formulation of executive compensation based on micromanagement under Rule 14a-8(i)(7). For example, in *Rite Aid Corp.* (avail. Apr. 23, 2021, recon. denied May 10, 2021), the Staff concurred with the exclusion of a proposal that requested the board adopt a policy that would prohibit equity compensation grants to senior executives when the company common stock had a market price lower than the grant date market price of any prior equity compensation grants to such executives. The company argued that the proposal prescribed specific limitations on the ability of its compensation committee "to make business judgments, without any flexibility or discretion," and restricted the compensation committee from "making any equity compensation grants to senior executives in certain instances without regard to circumstances and the committee's business judgment." *See also Gilead Sciences, Inc.* (avail. Dec. 23, 2020) (concurring with the exclusion of a proposal recommending the company reduce its named executive officer pay ratios each year until they reached 20 to one, where the company argued the terms of the proposal were prescriptive and would unduly limit the ability of management and the board to manage complex matters with a level of flexibility necessary to fulfill fiduciary duties to shareholders); *Comcast Corp.* (avail. Apr. 1, 2020) (concurring with the exclusion of a proposal reducing a company's CEO pay ratio by 25-50%); *JPMorgan Chase & Co.* (avail. Mar. 22, 2019) (concurring with the exclusion of a proposal that requested the board adopt a policy prohibiting the vesting of equity-based awards for senior executives who voluntarily resigned to enter government service); *AbbVie Inc.* (avail. Feb. 15, 2019) (concurring with the exclusion of a proposal requesting a policy to prohibit financial performance metric adjustments to exclude legal or compliance costs for the purposes of determining senior executive incentive

compensation, noting that the proposal "would prohibit any adjustment of the broad categories of expenses covered by the [p]roposal without regard to specific circumstances or the possibility of reasonable exceptions").

Here, the Proposal imposes an exclusive and restrictive method by which director compensation should be determined. The Proposal stipulates that director compensation must be fixed at $1 per fiscal year, unless (a) disclosed to shareholders in advance of the year in which compensation will be paid; (b) submitted for vote in advance of the year in which compensation will be paid; and (c) approved by a majority of shareholders votes in advance of the year in which compensation will be paid, excluding the votes of directors who are shareholders.

The Proposal removes any discretion of the Board to determine director compensation with respect to both current and future director compensation practices. Firstly, because the Proposal requires shareholder approval of any director compensation exceeding $1 *in advance of* the fiscal year in which the compensation will be paid, granted or awarded, the Proposal would require the Board to immediately cease any payment of previously agreed director compensation until the next year in which such compensation may be approved. Accordingly, the Proposal removes all Board discretion with respect to those compensation programs currently in effect, including payments already approved by the Board, by requiring the Company to cease paying any compensation already approved by the time of the 2024 Annual Meeting of Shareholders, should shareholders approve the Proposal.

The Proposal also inappropriately removes the discretion of the Board in determining any future director compensation. The Proposal prescribes highly specific and granular parameters under which director compensation should be determined and the timing element of the approval and payment. Because the Proposal is a binding resolution that would immediately amend the Company's Bylaws if approved by shareholders, the Board will have no discretion in either when or how to adopt the proposed terms of the Proposal. The Proposal effectively removes any Board discretion in determining director compensation, which is unduly restrictive and does not permit the necessary flexibility, both substantively and temporally, that the Board should be permitted to exercise in adopting director compensation that is best suited for the Company. Moreover, the Proposal inappropriately attempts to substitute the Board's views with respect to the Company's director compensation practices, notwithstanding the fact that the detailed considerations required to design and implement director compensation structures that align the directors' interests with those of the Company's shareholders and emphasize long-term thinking are complex. The Company's director compensation structure is determined according to strong corporate governance practices and the Company retains an independent compensation consulting firm which annually performs a comprehensive review of the Company's director compensation, including benchmarking director compensation at peer and similarly sized companies. Accordingly, the Proposal probes too deeply into matters of a complex nature upon which shareholders would not be in a position to make an informed judgment.

Consistent with the foregoing precedents and as described above, the Proposal would impose an exclusive means for determining the compensation of the Company's directors with a level of granularity that inappropriately removes the discretion of the Board and that probes matters too complex for shareholders, as a group, to make an informed judgment. As such, the Proposal is properly excludable under Rule 14a-8(i)(7).

CONCLUSION

For the foregoing reasons, I request your confirmation that the Staff will not recommend enforcement action to the Securities and Exchange Commission if the Company omits the Proposal from its 2024 Proxy Materials.

Respectfully yours,

Ning Chiu

Attachment

cc w/ att: Jeffrey Pochowicz
McDonald's Corporation

John Chevedden

Exhibit A

Proposal

Proposal 4 – Bylaw Amendment: Stockholder Approval of Director Compensation

The Bylaws of McDonald's Corporation are amended as follows:

Article III, Section 9. is deleted and replaced in its entirety as follows:

Compensation **–** No employee of the Corporation shall receive any additional compensation or remuneration for serving as a member of the Board of Directors. Members of the Board of Directors who are not otherwise employed by the Corporation may receive such compensation only as determined in this Section. The Board of Directors shall not have any authority to fix the compensation of directors. The compensation of directors the corporation pays shall be fixed at $1 in a fiscal year; provided, however, the corporation may pay, grant, or award compensation greater than $1 in a fiscal year if such compensation has been (1) disclosed to stockholders in advance of the fiscal year in which the corporation will pay, grant, or award such compensation; (2) submitted to an approval vote of stockholders at an annual or special meeting of stockholders in advance of the fiscal year in which the corporation will pay, grant, or award such disclosed compensation; and (3) approved by a majority of stockholders votes present in person or represented by proxies and entitled to vote cast in favor of the disclosed annual compensation at an annual or special meeting of stockholders in advance of the fiscal year in which the corporation will pay, grant, or award such compensation, which majority shall include only stockholder votes of stockholders that are not directors of the Company.

Supporting statement

McDonald's stockholders seek an independent Board of Directors, one that has as its sole objective representing stockholders without conflict of interest. One interest pertains to compensation and how McDonald's compensates directors for board service. Stockholders seek the authority to approve compensation that directors receive from McDonald's.

Stockholders want and need authority over how and how much McDonald's compensates directors. If stockholders approve compensation, then directors have the greatest incentive to work in the sole interest of stockholders. Currently, directors design and approve compensation with no approval from stockholders. Directors receive whatever compensation they desire. This bylaw amendment corrects this problem.

The bylaw amendment provides for a stockholder vote on director compensation. Directors can continue to design and propose compensation structure and amount, including the mix and amount of cash and equity. Stockholders will have final approval over whether Directors receive what directors propose. Stockholders will vote on Director compensation as disclosed in the proxy statement for a stockholder meeting before the fiscal year in which Directors receive that compensation. Stock owned by Directors will not count in the vote, so the vote result represents the independent views of stockholders.

I urge stockholders to approve this bylaw amendment and assume proper authority over the compensation of directors who represent us.

Exhibit B

Delaware Law Opinion

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, 2024

McDonald's Corporation
110 North Carpenter Street
Chicago, Illinois 60607

RE: Stockholder Proposal Submitted by John Chevedden

Ladies and Gentlemen:

This letter confirms our opinion regarding a stockholder proposal (the "Proposal") submitted to McDonald's Corporation, a Delaware corporation (the "Corporation"), by John Chevedden (the "Proponent") for inclusion in the Corporation's proxy materials for its 2024 annual meeting of stockholders. For the reasons explained below, it is our opinion that implementation of the Proposal would cause the Corporation to violate Delaware law and that the Corporation lacks the power and authority to implement the Proposal.

The Proposal would result in an automatic amendment to the Corporation's By-Laws. The amendment would prohibit the Corporation's Board of Directors from awarding annual compensation to directors over $1 unless, among other requirements, the compensation is approved by a "majority of stockholders votes present in person or represented by proxies." This vote on director compensation "shall include only stockholder votes of stockholders that are not directors" of the Corporation.[1]

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[1] The Proposal reads in its entirety as follows:

Article III, Section 9 [of the By-laws] is deleted and replaced in its entirety as follows: / Compensation – No employee of the Corporation shall receive any additional compensation or remuneration for serving as a member of the Board of Directors. Members of the Board of Directors who are not otherwise employed by the Corporation may receive such compensation only as determined in this Section. The Board of Directors shall not have any authority to fix the compensation of directors. The compensation of directors the corporation pays shall be fixed at $1 in a fiscal year; provided, however, the corporation may pay, grant, or award compensation greater than $1 in a fiscal year if such compensation has been (1) disclosed to stockholders in advance of the fiscal year in which the corporation will pay, grant, or award such compensation; (2) submitted to an approval vote of stockholders at an annual or special meeting of stockholders in advance of the fiscal year in which the corporation will pay, grant, or award such disclosed compensation; and (3) approved by a majority of stockholders votes present in person or represented by proxies and entitled to vote cast in favor of the disclosed annual compensation at an annual or special meeting of stockholders in advance of the fiscal year in which the corporation will pay, grant, or award such compensation, which majority shall include only stockholder votes of stockholders that are not directors of the Company.

Section 141(h) of the Delaware General Corporation Law (the "DGCL") authorizes a board of directors to fix director compensation unless that authority is restricted in the certificate of incorporation or by-laws. We doubt that a by-law requiring annual stockholder authorization for director compensation over $1 is a lawful "restriction" under Section 141(h). But we need not express a view on that broader issue because the stockholder vote included in the Proposal would violate the specific and express provisions of Section 212(a) of the DGCL.

The DGCL grants each stockholder of a Delaware corporation a fundamental franchise right to cast one vote per share of stock on all matters submitted for stockholder action. All stockholders are entitled to one vote per share. Section 212(a) of the DGCL states:

> Unless otherwise provided in the certificate of incorporation and subject to § 213 of this title, each stockholder shall be entitled to 1 vote for each share of capital stock held by such stockholder.[2]

The reference to "each stockholder" in Section 212(a) includes each director who holds common stock. Each director of the Corporation is therefore entitled to one vote for each share he or she holds if the by-laws call for a stockholder vote to authorize director compensation. The Proposal would violate the DGCL because it would divest certain stockholders (that is, stockholders who are directors) of their voting rights.

Under Section 212(a), the "one vote for every share" right may be modified only in one of two ways, and neither of them applies to the Proposal:

- Section 212(a) is "subject to" Section 213 of the DGCL. Section 213 allows a corporation's board of directors to fix a record date in advance of a stockholder meeting, to determine which stockholders are entitled to vote at an upcoming meeting. Section 213 means only that a director must hold stock as of the record date for a meeting in order to vote at the meeting. The Proposal would disenfranchise directors even if they hold stock as of the record date for a meeting, so the reference to Section 213 in Section 212(a) does not apply to the Proposal.

- The "one vote for every share" voting right does not apply if contrary provisions are made "in the certificate of incorporation." We have reviewed the Restated Certificate of Incorporation of the Corporation, and it contains no provision opting out of the "one vote for every share" right. The Proponent asks the stockholders of the Corporation to violate Section 212(a) of the DGCL by adopting a by-law that opts out of the "one vote for every share" rule. But Section 212(a) is clear: any opt out must be included solely in the certificate of incorporation, not in a by-law.[3]

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[2] 8 *Del. C.* § 212(a).

[3] When a statutory provision like Section 212(a) is subject only to opt-outs "otherwise provided in the certificate of incorporation," this language operates as a "by-law excluder in the sense that those words make clear that the specific grant of authority in that particular statute is one that can be varied only by charter and therefore

Section 212(a) neither contemplates nor permits unilateral action by stockholders to amend by-laws to disenfranchise a sub-group of stockholders.[4] The case law interpreting Section 212(a) supports this conclusion. In each case where the Delaware courts have upheld a corporation's deviation from the "one vote for every share" rule, that deviation has been implemented through a provision in the certificate of incorporation, not the by-laws.[5] The Proposal does not contemplate any such amendment of the Corporation's Restated Certificate of Incorporation. The Proposal instead seeks unilateral amendment of the By-Laws by the stockholders to disqualify certain shares that would be entitled to vote in connection with a stockholder vote to authorize director compensation.

Because the Proposal would nullify the voting power of stock owned by directors, the Proposal asks the stockholders to amend the By-Laws of the Corporation in a manner expressly prohibited by Delaware law. Accordingly, it is our opinion that implementation of the Proposal would cause the Corporation to violate Delaware law and that the Corporation lacks the power and authority to implement the Proposal.

Very truly yours,

17491137

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indisputably not one that can be altered by a § 109 bylaw." *Jones Apparel Group, Inc. v. Maxwell Shoe Company, Inc.*, 883 A.2d 837, 848 (Del. Ch. 2004).

4 In contrast to the Proposal, if directors are concerned that their compensation may be questioned or challenged in litigation, the directors might ask stockholders to *ratify* the compensation by a stockholder vote that excludes stock owned by directors. Ratification votes are voluntarily submitted by a board and are *in addition to* the vote required to authorize an action. *See Lewis v. Vogelstein*, 699 A.2d 327, 334 (Del. Ch. 1997) (distinguishing ratification votes from "those instances in which shareholder votes are a necessary step in authorizing a transaction."). The Proposal would impose a mandatory *authorization* vote, not a voluntary *ratification* vote. Accordingly, the Proposal must comply with the "one vote for each share" rule imposed by Section 212(a).

5 *See Colon v. Bumble, Inc.*, 2023 WL 5920100 (Del. Ch. Sept. 12, 2023); *Providence & Worcester Co. v. Baker*, 378 A.2d 121 (Del. 1977); *Williams v. Geier*, 1987 WL 11285 (Del Ch. May 20, 1987); *Sagusa, Inc. v. Magellan Petroleum Corp.*, 1993 WL 512487 (Del. Ch. Dec. 1, 1993), *aff'd*, 650 A.2d 1306 (Del. 1994) (Table).

February 3, 2024

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

 # 1 Rule 14a-8 Proposal
McDonald's Corporation (MCD)
Shareholder Approval of Director Compensation
John Chevedden
Regarding January 23, 2024 No Action Request
499506

Ladies and Gentlemen:

I write in response to the notice from McDonald's that it intends to omit from its proxy statement and form of proxy for its 2024 Annual Meeting of Stockholders my stockholder proposal and supporting statement. We have sent a copy of this correspondence to McDonald's.

McDonald's asserts three bases for excluding the proposal:

1. Implementation of the proposal will cause McDonald's to violate Delaware law (Rule 14a-8(i)(2))
2. McDonald's lacks the power and authority to implement the proposal (Rule 14a-8(i)(6)
3. The proposal deals with matters related to McDonald's ordinary business operations (Rule 14a-8(i)(7)).

This letter rebuts those bases and urges the SEC to seek an enforcement action if McDonald's so omits the proposal.

The first two bases constitute a single basis, namely the proposal will cause McDonald's to violate Delaware law. In the second listed basis, McDonald's asserts it lacks the power and authority to implement the proposal because doing so will violate Delaware law. Below, we rebut both bases together in demonstrating that the proposal does not violate Delaware law. In the argument for the second listed basis, McDonald's also asserts it lacks the power and authority to implement it because it will cause it to "breach its contractual obligations under its existing director compensation programs". We address this basis separately below. We also address the third basis, ordinary business operations.

1. **<u>Violation of Delaware Law</u>**

<u>McDonald's Argument</u>

McDonald's asserts implementing the proposal would cause it to violate Delaware law. Specifically, the proposal will disenfranchise directors that also own McDonald's shares,

since those directors cannot vote those shares in the required stockholder vote on director compensation. It explains that Delaware law generally provides all stockholders with "one vote for every share". Any directors that are also stockholders will then not have the opportunity to vote in the matter of director compensation.

Rebuttal

We acknowledge the bylaw amendment in the proposal disenfranchises corporate directors that also own shares in the corporation. That's the point. As indicated in the Supporting Statement, if the directors do not vote on their own compensation, then the "vote result represents the independent views of stockholders."

Also, it is so patently obvious that there is no greater conflict of interest than when directors design and approve their own compensation that we need not prove this any further. Directors are inherently conflicted in this matter. Delaware law provides a mechanism for overcoming this conflict.

Delaware law restricts how corporate directors, regardless of whether and how many shares they own in the corporation, decide on matters in which they have a material interest. In this instance, we can interpret Delaware law to allow a bylaw term that prevents corporate directors from voting, *as shareholders*, on their own compensation. Delaware law places a higher priority on limiting the impact of that personal interest than on preserving the right of a director to vote, as a shareholder, on that compensation.

Under various circumstances, Delaware law also restricts how shareholders decide on many matters in which they have a material interest. It follows that Delaware law would restrict directors *as shareholders* in how they vote on the specific matter of their own compensation.

There is no guidance, in Delaware statue or case law, that pertains to corporate directors voting on their own compensation *as shareholders*. To our knowledge, the law that pertains to shareholder votes on director compensation do not address in any way how directors *as shareholders* can vote on director compensation. Thus, we must infer how Delaware law would apply to this bylaw term from other similar instances of how that law would apply. We consider how Delaware law applies to specific director compensation votes and to general director conflicts.

Specific director compensation votes

Delaware law does prescribe how corporate directors vote on their own compensation, *as directors* rather than *as shareholders*. It also provides some guidance about how all shareholders vote on director compensation. Overall, this law prescribes strict limits on these votes.

Director votes on director compensation

Statute: Delaware statute does allow corporations to compensate directors (DGCL Section 141(h)). This section also allows corporate bylaws to restrict this compensation, as this proposal provides. Otherwise, statute is silent as to director compensation.

Case law: Delaware case law also limits how directors can approve their own compensation. These limits pertain to directors approving this compensation as a voting member of the

corporate board of directors, rather than as a shareholder. In many of these cases the director is also a shareholder, and the court still restricts the directors' discretion to approve their own compensation.

Typically, the limit involves having independent shareholders approve director compensation. The general principle is, "a majority of fully informed, uncoerced, and *disinterested* stockholders" (our emphasis) are needed to approve director compensation, as stated most recently and forcefully in *Investors Bancorp*. Directors that are stockholders in the corporation would not be disinterested, and thus would not have a vote on their own compensation.

Shareholder votes on director compensation

Statute: Delaware statute makes no provision for shareholders to vote on director compensation. Instead, it allows corporate bylaws to restrict director compensation in whatever way shareholders deem appropriate, including with a binding shareholder vote on compensation, as in this proposal.

Case law: Like statute, there are very few cases that pertain to whether, when, and how shareholders vote on director compensation. *Investors Bancorp* is the most recent and forceful case. As noted above, that case does provide for a binding vote of disinterested shareholders to approve compensation.

General director independence and conflicts

Delaware law addresses director independence in many ways. Overall, it places a high priority on assuring directors decide in ways that favor the corporation interest over their own, including not voting on the decision. Delaware law addresses those votes in the director capacity as a member of the board of directors, rather than as a shareholder.

Delaware law also provides for assuring shareholders with conflicts decide matters in ways that do not unduly favor their own interest relative to other shareholders. To our knowledge, Delaware law does not provide for limits on directors voting *as shareholders* on matters where they may have a conflict, beyond the general limits on all shareholders on such matters.

As a voting member of the board of directors

Statute: For decisions where a director may have a conflict, Delaware statute clearly requires approval of only "disinterested" directors (DGCL Section 144(a)(1)). While statute is not specific about the nature and kinds of decisions, it refers to "transactions" with directors, and director compensation is clearly a "transaction". It follows that since directors are not "disinterested" in deciding on their own compensation, then shareholders may prevent, through the corporate bylaws, directors from voting on that compensation.

Case law: Delaware cases further emphasizes director independence. Numerous cases address the process by which directors decide on many matters, and all limit or prevent conflicted directors from voting on such decisions.

As a shareholder

Delaware law compels a shareholder to abstain from a vote in certain cases of a direct and material conflict of interest. In this sense, the proposal codifies this law in McDonald's bylaws in the matter of director compensation.

Statute: Delaware statute is largely silent as to whether, when, and how shareholders can vote on a matter in which the shareholder has a conflict.

Case law: Numerous cases limit or prevent a shareholder from voting on a corporate matter in which they have a specific conflict. Almost all cases involve defining the nature and extent of conflict, and the extent of ownership needed to put a shareholder in a position of having a material influence over a shareholder vote. Directors that are also shareholders have a clear conflict in voting on their own compensation, and these cases would serve to limit a director voting, as a shareholder, on their own compensation.

Conclusion

We concur this proposal will disenfranchise McDonald's directors as shareholders. At the same time, directors have a clear, inherent conflict of interest in designing and approving their own compensation.

Delaware law will allow a bylaw amendment that prevents directors from voting, *as shareholders*, on their own compensation. Statue and case law favors addressing this clear conflict over whatever rights directors have as shareholders. That law allows McDonald's to codify in its bylaws a standard practice of directors and shareholders abstaining from decisions for which they have a conflict of interest.
Thus, proposal does not violate Delaware law. We expect Delaware Chancery Court would find the bylaw valid.

2. **Contractual obligations**

McDonald's asserts the bylaw term would cause it "to breach its contractual obligations under its existing director compensation programs." We disagree the bylaw term will do this, on two grounds. First, the director compensation programs that McDonalds's describes do not represent a binding contractual obligation. Second, the bylaw term will not cause McDonald's to "cease any payment of director compensation that was already awarded", presumably for Fiscal Year 2024.

Furthermore, to the extent that McDonald's fears that the bylaw term will preclude it from compensating directors during Fiscal Year 2024, it can also submit those compensation plans to a shareholder vote, pursuant to the bylaw terms.

Not a binding contract: McDonald's refers to "forms and types of director compensation that will not have been paid yet by the time of the 2024 Annual Meeting of Shareholders", including under its Directors' Deferred Compensation Plan. McDonald's does not explain how these plans represent a binding contract in which directors serve on the Board in consideration of the compensation to which McDonald's refers. Directors agree to serve on the Board before they know the nature and extent of the compensation they will receive. At the time they accept their appointment, when elected at each annual shareholder meeting, they have yet to even discuss their precise future compensation. We presume those just-elected directors consider past compensation paid to directors, McDonald's history of reliably paying compensation, and possibly representations from McDonald's that it intends to pay compensation in the future for Board service. However, we find no specific agreement

between McDonald's and a given director related to the specific compensation that directors receive. Thus, the arrangement between directors and McDonald's fails to meet the definition of a contract.

Does not preclude payment for Fiscal Year 2024: Even in the absence of a binding contract, McDonald's can pay compensation for Fiscal Year 2024. This assumes shareholders approve the proposal at the 2024 Annual Meeting of Shareholders, and the bylaw takes effect immediately. McDonald's would then disclose and submit to a shareholder vote for compensation for in Fiscal Year 2025. For compensation for Fiscal Year 2025, McDonald's could easily schedule an online special shareholder meeting during 2024 for the purpose of approving that compensation. For compensation for Fiscal Year 2024, McDonald's can similarly disclose and submit to the same shareholder vote that director compensation.

3. **Ordinary Business**

McDonald's asserts the bylaw term will "micromanage the company" and "imposes specific methods for determining director compensation. It thus allegedly represents ordinary business, subject to exclusion under Rule 14a-8(i)(7). Either McDonald's did not read the proposal closely, or misstates and misunderstands, inadvertently or willfully, the contents of the proposal. McDonald's fails to show how the specific bylaw term, providing for a shareholder vote on director compensation, represents ordinary business.

After an exhaustive recitation of the precedent about the ordinary business exception (p. 5-6), McDonald's says the bylaw term "imposes an exclusive and restrictive method" of "determining" executive compensation. If we take "determining" to mean "approving", then this is true: approving director compensation will lie exclusively with shareholders, who will have final, restrictive authority over that compensation.

McDonalds then makes two arguments, following two general principles the SEC uses in assessing whether a proposal represents "ordinary business". First, it asserts the proposal "limits discretion of the board." Second, the proposal is "too complex" for shareholders to decide on.

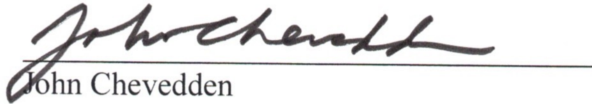
Board discretion: As for the first principle, McDonald's asserts the proposal "inappropriately removes the discretion of the Board in determining … director compensation". If we take "determining" to mean design and recommend, in whatever structure and amount it wishes, in whatever detail the Board desires, the proposed director compensation for a fiscal year, then the proposal does not remove any such discretion. The Board can design whatever compensation plan it wishes, without any restriction from shareholders. It must then disclose whatever it designs, submit that design to a vote, and win a majority of shares voting. The bylaw term does not prescribe any element or detail of director compensation, nor does it provide in any way for shareholders to so prescribe. It merely provides for shareholders to vote on and approve whatever compensation the Board discloses.

Note, in its argument that the proposal removes Board discretion, McDonald's conflates the extent to which the proposal represents ordinary business with the extent to which it will affect compensation for Fiscal Year 2024 ("future compensation"). We address the latter component above in demonstrating the proposal does not affect existing compensation obligations.

Too complex for shareholders: As for the second principle, McDonald's asserts the bylaw term "probes matters too complex for shareholders, as a group, to make an informed

judgment." McDonald's fails to show in any way how director compensation is too complex a subject for shareholders to vote on. We note shareholders now vote annual on executive compensation, a subject of at least as much and probably deeper complexity.

Sincerely,



John Chevedden

cc: Jeffrey Pochowicz

[MCD: Rule 14a-8 Proposal, December 12, 2023]
[This line and any line above it – *Not* for publication.]

Proposal 4 – Bylaw Amendment: Stockholder Approval of Director Compensation

The Bylaws of McDonald's Corporation are amended as follows:

Article III, Section 9. is deleted and replaced in its entirety as follows:

Compensation – No employee of the Corporation shall receive any additional compensation or remuneration for serving as a member of the Board of Directors. Members of the Board of Directors who are not otherwise employed by the Corporation may receive such compensation only as determined in this Section. The Board of Directors shall not have any authority to fix the compensation of directors. The compensation of directors the corporation pays shall be fixed at $1 in a fiscal year; provided, however, the corporation may pay, grant, or award compensation greater than $1 in a fiscal year if such compensation has been (1) disclosed to stockholders in advance of the fiscal year in which the corporation will pay, grant, or award such compensation; (2) submitted to an approval vote of stockholders at an annual or special meeting of stockholders in advance of the fiscal year in which the corporation will pay, grant, or award such disclosed compensation; and (3) approved by a majority of stockholders votes present in person or represented by proxies and entitled to vote cast in favor of the disclosed annual compensation at an annual or special meeting of stockholders in advance of the fiscal year in which the corporation will pay, grant, or award such compensation, which majority shall include only stockholder votes of stockholders that are not directors of the Company.

Supporting statement

McDonald's stockholders seek an independent Board of Directors, one that has as its sole objective representing stockholders without conflict of interest. One interest pertains to compensation and how McDonald's compensates directors for board service. Stockholders seek the authority to approve compensation that directors receive from McDonald's.

Stockholders want and need authority over how and how much McDonald's compensates directors. If stockholders approve compensation, then directors have the greatest incentive to work in the sole interest of stockholders. Currently, directors design and approve compensation with no approval from stockholders. Directors receive whatever compensation they desire. This bylaw amendment corrects this problem.

The bylaw amendment provides for a stockholder vote on director compensation. Directors can continue to design and propose compensation structure and amount, including the mix and amount of cash and equity. Stockholders will have final approval over whether Directors receive what directors propose. Stockholders will vote on Director compensation as disclosed in the proxy statement for a stockholder meeting before the fiscal year in which Directors receive that compensation. Stock owned by Directors will not count in the vote, so the vote result represents the independent views of stockholders.

I urge stockholders to approve this bylaw amendment and assume proper authority over the compensation of directors who represent us.