

## Revisit DEI Goals in Executive Pay Incentives

**WHEREAS:** Since the June 2023 U.S. Supreme Court decision in *Students for Fair Admissions v. Harvard College*,<sup>1</sup> hundreds of higher education institutions have shuttered their diversity, equity and inclusion (DEI) programs and positions.<sup>2</sup>

Consequently, “there has been a sharp uptick in litigation challenging corporate DEI programs and initiatives, alleging that they require unlawful employment and contracting decisions to be made on the basis of race, in violation of Title VII of the Civil Rights Act of 1964...”<sup>3</sup>

Corporations’ compliance lawyers now advise clients that “DEI initiatives and programs that are not open to all applicants or those that apply an explicit race- or gender-based focus will likely face continued and heightened scrutiny.” Also: “We also expect to see ongoing scrutiny of perceived hiring quotas and set-asides, particularly those that may appear to be incentivized by bonuses for management or company leadership.”<sup>4</sup>

Further, “companies, and their management teams and boards, should be prepared for increased employment-related litigation including litigation that seeks to hold executive officers and directors personally liable for purported breaches of their fiduciary duties in connection with the corporation’s DEI policies.”<sup>5</sup>

Many corporations dramatically reduced or eliminated their DEI programs,<sup>6</sup> and companies face retribution for their discrimination. For example, Starbucks was the subject of a \$28.3 million judgment after a former worker claimed she was fired for being white.<sup>7</sup>

**SUPPORTING STATEMENT:** McDonald’s Corporation (“Company”) has set leadership representation goals of 45 percent for women and 35 percent for “underrepresented groups” by the end of 2025.<sup>8</sup> Additionally, the Company “aspires to increase U.S. systemwide spend with diverse-owned suppliers to 25% by the end of 2025.”

Pay for the Company’s executives includes incentives for progress towards “human capital metrics,” which “align with our strategic aspirations and hold executives accountable for efforts towards the Company’s DEI ambitions.”<sup>9</sup> McDonald’s has devised a point system in its short-term incentive plan for attaining “diverse representation in leadership roles,” which also includes

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<sup>1</sup> [https://www.supremecourt.gov/opinions/22pdf/20-1199\\_hgdj.pdf](https://www.supremecourt.gov/opinions/22pdf/20-1199_hgdj.pdf)

<sup>2</sup> <https://www.chronicle.com/article/tracking-higher-eds-dismantling-of-dei>

<sup>3</sup> <https://www.wilmerhale.com/insights/client-alerts/20240627-corporate-dei-landscape-one-year-after-sffa>

<sup>4</sup> <https://www.skadden.com/insights/publications/2023/12/2024-insights/esg/the-supreme-courts-affirmative-action-opinion>

<sup>5</sup> <https://corpgov.law.harvard.edu/2024/02/14/how-boards-should-be-thinking-about-the-supreme-courts-sffa-affirmative-action-decision/>

<sup>6</sup> <https://nypost.com/2024/09/03/us-news/how-robbey-starbucks-is-prompting-brands-like-ford-to-ditch-dei/>

<sup>7</sup> <https://www.cnn.com/2023/08/17/business/starbucks-payment-racial-discrimination-white/index.html>

<sup>8</sup> <https://corporate.mcdonalds.com/corpmcd/our-purpose-and-impact/impact-strategy-and-reporting/performance-reports.html#diversityEquityAndInclusion>

<sup>9</sup>

[https://corporate.mcdonalds.com/content/dam/sites/corp/nfl/pdf/2024%20Notice%20of%20Meeting%20and%20Proxy%20Statement\\_vf.pdf](https://corporate.mcdonalds.com/content/dam/sites/corp/nfl/pdf/2024%20Notice%20of%20Meeting%20and%20Proxy%20Statement_vf.pdf)

conversion of franchisee applicants into new restaurant owners, “and diversity of such new owners.” Calculation of the Company’s Human Capital Metrics points “progress” represents 15% of the payout to executives in its short-term incentives plan.

These discriminatory quotas leave the Company ripe for regulatory, reputational and litigation risk. Its attempt to cram DEI’s non-GAAP nature into the proxy statement’s compensation discussion demands either a legally dubious quota regime, or it fails SEC compliance.<sup>10</sup> The Council of Institutional Investors’ general counsel stated that research shows “companies are engaging in an opportunistic use of non-GAAP earnings to justify higher executive pay.”

FTI Consulting advises there is a “heightened focus” on “litigation risk,” which “has transitioned from being merely an operational concern to becoming a strategic priority for the highest levels of corporate governance.”<sup>11</sup>

**RESOLVED:** Shareholders request the Board of Directors’ Compensation Committee to revisit its incentive guidelines for executive pay, to identify and consider eliminating discriminatory DEI goals from compensation inducements.

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<sup>10</sup> <https://tax.thomsonreuters.com/news/council-of-institutional-investors-again-urges-sec-to-close-loophole-on-non-gaap-in-executive-pay/>

<sup>11</sup> <https://www.fticonsulting.com/insights/articles/de-risking-litigation-exposure-conflict-management-integral-business-administration>