



December 12, 2023

Arvind Krishna, Chairman of the Board and Chief Executive Officer
International Business Machines Corporation
1 New Orchard Road
Armonk, New York 10504-1722

Re: Violations of Federal Law and Waste of Corporate Assets

Dear Mr. Krishna:

America First Legal Foundation (“AFL”) is a national, nonprofit organization working to protect the rule of law, due process, and equal protection for all Americans.

This letter notifies you about potential mismanagement and, apparently, intentional violations of federal and state civil rights laws that threaten the waste of the International Business Machines Corporation (IBM) assets. As you know, workplace anti-discrimination mandates are an essential and mission-critical regulatory compliance risk. You and the Board, among your other fiduciary obligations, have a duty of oversight and must put into place a reasonable system of compliance monitoring and reporting relating to these mandates. However, it appears that management and the Board have failed to take these critical steps, suggesting a lack of internal controls and an inappropriate disregard for your fiduciary duties to the Company and its shareholders. Furthermore, it appears that the Board has improperly failed to disclose the risks of its employment and environmental, social, and governance (ESG) policies to shareholders.

I. Unlawful Employment Practices

In a video posted on X on December 11, 2023, you admitted engaging in unlawful employment practices. Specifically, you said that you would fire, demote, or deny bonuses to corporate executives who either fail to meet the corporation’s racial, national origin, or sex-based hiring quotas or who hire too many Asian individuals.¹ Also, Paul Cormier, the chairman of IBM subsidiary Red Hat, admits employees who

¹ “Asians in the US are not an underrepresented minority in a tech company ... I’m not going to finesse this, for blacks we should try to get towards 13 point something percent,” says Krishna. James O’Keefe (@JamesO’KeefeIII), TWITTER (Dec. 11, 2023, 7:47 PM), <https://bit.ly/46ZvXOm> (starting at the 7:56 mark).

failed to meet or comply with the corporation's unlawful racial, national origin, and sex-based hiring quotas were terminated.

Relating to hiring based on race, national origin, or sex, you, as the Chairman of the Board and Chief Executive Officer, said:

I expect at the executive level, so that is not just my directs, but all executives in the company, have to move forward by 1% on both underrepresented minorities. Let me say it, Asians in the US are not an underrepresented minority in a tech company. However, others are. So we take underrepresented and gender. You've got to move both forward by a percentage. That leads to a plus on your bonus. By the way, if you lose, you lose part of your bonus.²

Red Hat CEO Paul Cormier, when discussing hiring based on race, color, sex, or national origin, said:

There were multiple leaders over the last year plus that were held accountable to the point that they're no longer here at Red Hat, because they weren't willing to live up to the standards that we set in this space.³

Mr. Cormier also stated: "I hold myself accountable. He holds me accountable, as does the board for all of IBM."⁴

The corporation's 2022 Annual Report and 2022 ESG Report clearly state that executives are financially incentivized *to discriminate in hiring, promotion, and retention*. The Annual Report states:

Our executive compensation program metrics include a diversity modifier to reinforce our focus and continued accountability for improving the diverse representation of our workforce. Globally, our executives are measured on the improvement of diversity and inclusion for women. In the U.S., executives are also measured on improvement of diversity and inclusion for U.S. underrepresented minorities.⁵

² James O'Keefe (@JamesOKeefeIII), TWITTER (Dec. 11, 2023, 7:47 PM), <https://bit.ly/46ZvXOm> (starting at the 7:45 mark).

³ *Id.*, (starting at the 10:17 mark).

⁴ *Id.*, (starting at the 10:05 mark).

⁵ IBM Annual Report (Form 10-K), at p. 16 (Feb. 28, 2023), available at <https://ibm.co/48dY2Ti>.

The 2022 ESG Report states:

To reinforce our focus on improving the diverse representation of our workforce, we link executive compensation with the company's performance in key diversity areas. A modifier for diversity results is included in the annual incentive program for our executives globally and is based on improvement in executive representation for women globally and U.S. underrepresented minority (URM) groups (specifically, Black and Hispanic) for our executives in the U.S.⁶

IBM's 2023 Notice of Annual Meeting and Proxy Statement makes it clear that executive compensation (the Annual Incentive Program ("AIP")) is based on meeting discriminatory hiring, promotion, or retention goals.⁷

Our Incentive Compensation Design Supports our Business Strategy

Our senior executive pay is heavily weighted to IBM's performance through the annual and long-term incentive programs. Each year, the Committee ensures that these programs are closely aligned to the Company's financial and strategic objectives and are appropriately balanced. Targets are set at challenging levels and are consistent with IBM's financial model shared with investors for that year. As part of IBM's ongoing management system, targets are evaluated to ensure they do not encourage an inappropriate amount of risk taking.

2022 Metrics and Weightings

AIP	IBM Revenue (50%)	→	Measures total IBM revenue performance across the IBM portfolio of business
	Operating Cash Flow* (50%)	→	Measure of our ability to reinvest and return value to stockholders
	Diversity Modifier	→	Reinforces senior management's focus on improving a diverse representation of our workforce that reflects the labor pool demographics of the communities in which we operate

IBM is engaging in activity that its own Business Conduct Guidelines identify as corrosive and unrelated to IBM's legitimate business interests. Further, IBM's Business Conduct Guidelines specifically recognize that discrimination against any employee hurts the work environment and is prohibited. This value is so important that every employee worldwide must certify their understanding of the Business Conduct Guidelines. However, it appears the Board of Directors and you, the Chief Executive, are unfamiliar with the Business Conduct Guidelines and need a refresher course. The actions of the Board, its Chief Executive, and other executives are creating a severe legal risk as it appears they are condoning and encouraging discrimination in hiring, promotion, and retention.

⁶ 2022 IBM ESG Report at 28 (2022), <https://ibm.co/48w3v8f>.

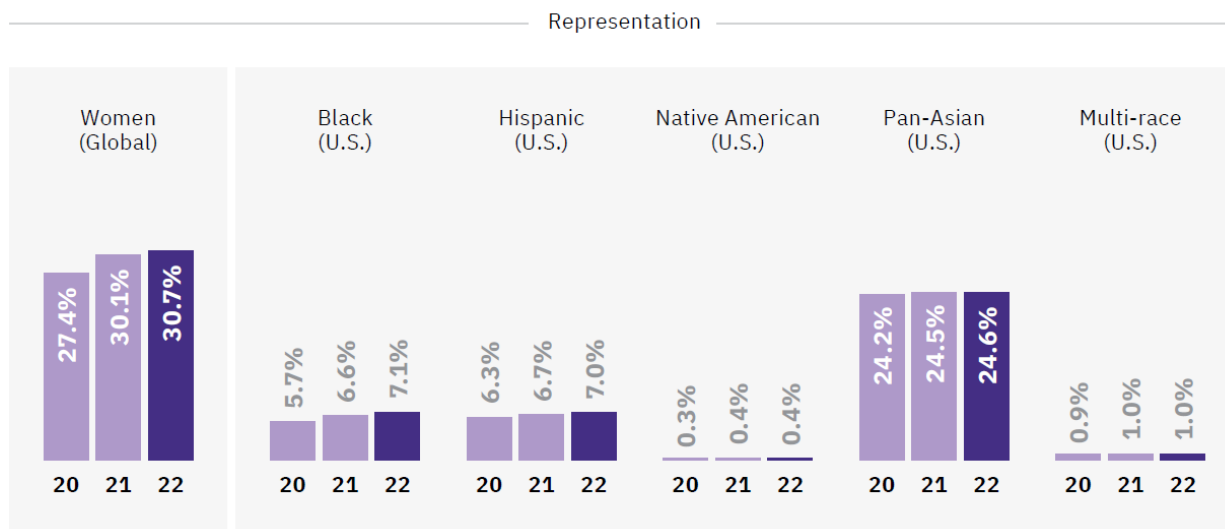
⁷ IBM, 2023 Notice of Annual Meeting and Proxy Statement, p. 34 (March 6, 2023), <https://ibm.co/3GFyZN2>.

IBM has not been shy about its discrimination in hiring, promotion, and retention.⁸ Aside from encouraging executives through compensation, Mr. Comier highlights that IBM has created a specific analytics tool to discriminate more effectively. He stated: “The DEI team with the people’s analytics team is establishing dashboards that we’ll all be able to share with the entire company which we can review at an open forum.”⁹ Perhaps this tool was created so executives can ensure they hit their internal 1% “diverse” growth quotas to obtain additional compensation. And unsurprisingly, encouraging executives through compensation has yielded results as identified in the 2022 Annual Report:

Women make up more than one-third of our workforce. In addition, executive representation of women globally, and Hispanic and Black executives in the U.S. improved by 0.3 points, 0.4 points and 0.6 points, respectively, in 2022.¹⁰

IBM’s 2022 ESG Report provides the following charts showing the success of its discriminatory compensation program for technical employees and executive-level employees:

Technical (includes Distinguished Engineers, Designers, IBM Fellows, etc.)



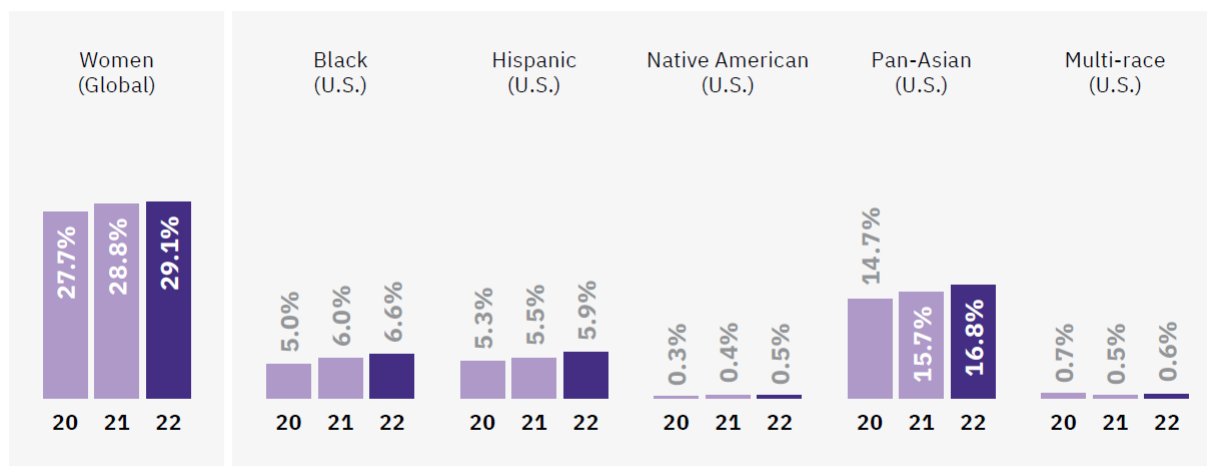
⁸ See IBM Annual Report (Form 10-K), at p. 16 (Feb. 28, 2023), available at <https://ibm.co/48dY2Ti>; 2022 IBM ESG Report at 28 (2022), <https://ibm.co/48w3v8f>.

⁹ James O’Keefe (@JamesOKeefeIII), TWITTER (Dec. 11, 2023, 7:47 PM), <https://bit.ly/46ZvXOm> (starting at the 11:57 mark).

¹⁰ IBM Annual Report (Form 10-K), at p. 16 (Feb. 28, 2023), available at <https://ibm.co/48dY2Ti>.

Executive (includes Director level and above)

Representation



As noted in the Proxy, excluding Red Hat, executive representation of women globally, as well as Black and Hispanic executives in the U.S., improved by 0.3 points, 0.7 points and 0.3 points, respectively in 2022.

Regardless of intent, these race-based quotas and hiring practices are categorically illegal. If, as management has bragged, its decisions are influenced or driven by race, color, national origin, or sex, then management is violating the law, creating significant legal and reputational risk, and wasting the corporation's assets, reputation, and goodwill.

Racial, ethnic, and sex-based "balancing" and quotas in hiring, training, compensation, and promotion are patently unlawful. See 42 U.S.C. §§ 2000e-2(a), (d). Here, the evidence is that you are knowingly and intentionally discriminating with respect to compensation, terms, conditions, or privileges of employment because of race and sex in violation of 42 U.S.C. § 2000e-2(a)(1). Your conduct has recklessly exposed IBM to potential state and federal civil rights investigations, state and federal enforcement actions, and significant reputational harm. Such conduct suggests either a disregard for your fiduciary obligations or a major breakdown in the Board's compliance controls.

II. Unlawful Contracting Practices

IBM also appears to be engaged in discrimination in contracting with its suppliers. IBM has a "Supplier Diversity Spend" where it brags that it spent \$1.1 billion dollars on First-Tier suppliers in the US that are "diverse" and a total of \$2 billion with all "diverse" suppliers globally.¹¹

¹¹ 2022 IBM ESG Report at 39 (2022), <https://ibm.co/48w3v8f>.

Supplier Diversity Spend (\$B)*		2022
First-Tier	U.S.	1.1
	Non-U.S.	0.45
First-Tier and Second-Tier	Total Worldwide	2.0

IBM’s 2022 ESG Report states that “IBM has committed to dedicating 15% of our first-tier supplier diversity spending to Black-owned businesses by 2025. In 2022, 6.9% of our first-tier supplier diversity spend was with Black-owned suppliers.”¹² Contracting on the basis of race is a violation of federal law.¹³ Since the Civil Rights Act of 1866, codified at 42 U.S.C. § 1981, federal law has prohibited all forms of racial discrimination in private contracting. As the late Justice Ginsburg stated, this act was designed to “break down all discrimination between black men and white men regarding basic civil rights.”¹⁴

Your admissions strongly suggest that the corporation is knowingly and intentionally violating well-established federal civil rights laws. Alternatively, if the corporation is not actually engaging in the above-described conduct but merely pretending to do so, then it is cynically and intentionally misleading customers, workers, and investors. There is no third alternative. Management has wrongly concealed from investors these risks associated with its ESG policies. Neither the relevant Annual Report nor the company’s Proxy Statements acknowledge the enforcement, market, and reputational risks associated with IBM’s extreme ESG stance.¹⁵

III. Waste and Breach of Fiduciary Duty

Beyond the legal risk that these violations create for IBM shareholders, they are wasteful of corporate assets.

IBM has chosen to implement racial quotas for employees at the company.¹⁶ When IBM chooses to arbitrarily limit its talent pool for hiring and promotions to members of preferred racial groups, it necessarily passes over some of the most qualified candidates. These candidates will likely seek, and find, employment with IBM’s competitors. Intentionally rejecting qualified applicants in favor of those who belong

¹² *Id.*

¹³ 42 U.S.C. § 1981

¹⁴ *Comcast Corp. v. Nat’l Ass’n of Afr. Am.-Owned Media*, 140 S.Ct. 1009, 1020 (2020) (Ginsburg, J. concurring) (quoting *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 432 (1968)).

¹⁵ See IBM Annual Report (Form 10-K) (Feb. 28, 2023), available at <https://ibm.co/48dY2Ti>; 2022 IBM ESG Report (2022), <https://ibm.co/48w3v8f>.

¹⁶ James O’Keefe (@JamesO’KeefeIII), TWITTER (Dec. 11, 2023, 7:47 PM), <https://bit.ly/46ZvXOm> (starting at the 7:45 mark).

to more favored racial groups is not in the financial best interests of the shareholders, and constitutes a breach of IBM's fiduciary duties.

Similarly, IBM has chosen to implement racial preferences when selecting its suppliers.¹⁷ This directly violates IBM's own Business Conduct Guidelines, which state that "In deciding among competing suppliers ... we weigh the facts impartially to determine the best supplier."¹⁸ IBM has deliberately chosen to violate these guidelines and select some suppliers based on race instead of an impartial assessment of value. This necessarily causes IBM to select suppliers with higher prices or lower quality products. Either outcome results in reduced value for the shareholders, and violates IBM's fiduciary duties.

IV. Conclusion

The corporation is organized and carried on primarily for the profit of shareholders. If you are unable to demonstrate that the above-described conduct and policies clearly and concretely create shareholder value, then you have violated your fiduciary duty to shareholders. Even if your immoral hiring policies were legal (which they are not), none of them have anything to do with the quality of the corporation's products and services, and arbitrarily limiting the talent pool for key roles and contracts based on race undermines IBM's ability to build value for its shareholders.

To prevent the waste of the Company's assets, to repair and safeguard the Company's brand, goodwill, and reputation, to protect the Company's shareholders, and in fulfillment of your fiduciary duty to ensure the Company complies with civil rights laws and uses corporate funds for business-related matters only, the Board should immediately take the following steps:

1. Retain an independent counsel for a full investigation of and a report on the events and circumstances behind IBM's Board and Management's decision to explicitly focus on a clear pattern of unlawful hiring, promotions, and retention practices for admittedly race-based and sex-based purposes.
2. IBM should: (a) Immediately cease and desist from all employment practices that discriminate based on race, color, sex, or national origin, and/or that are designed to match the combined demographics of any racial or other group; (b) immediately cease and desist from making any statements or representations promoting or promising employment outcomes based on race, color, sex, and/or national origin; and (c) retain an independent counsel to conduct a compliance

¹⁷ 2022 IBM ESG Report at 5 (2022), <https://ibm.co/48w3v8f> ("We also continue to advance our goal of having 15% of IBM's first-tier diversity spending with Black-owned suppliers by 2025.").

¹⁸ IBM, *Business Conduct Guidelines*, available at <https://ibm.co/47UUAgo>.

audit of IBM's hiring, promotion, recruitment, and purchasing practices and to ensure they comply with federal civil rights laws.

3. In anticipation of litigation, the Board should preserve all records relevant to the issues and concerns noted above, including but not limited to paper records and electronic information, including email, electronic calendars, financial spreadsheets, PDF documents, Word documents, and all other information created and/or stored digitally, including any databases and dashboards created for DEI purposes. This list is intended to give examples of the types of records you should retain. It is not exhaustive. Thank you in advance for your cooperation.

Sincerely,

/s/ Gene P. Hamilton

Gene P. Hamilton

America First Legal Foundation

APPENDIX

Our vision for diversity and inclusion at IBM

We foster a culture of conscious inclusion and active allyship, where every IBMer can make a positive impact on society while bringing their authentic selves to work. We are building this through creating a more diverse workforce, cultivating a flexible work environment, enabling an inclusive culture, and advocating for equity, both inside and outside of IBM.

Advocacy

IBM works to drive systemic change that creates opportunity for diverse communities

Allyship

IBM provides training and support to help every IBMer be an upstander through inclusive behaviors

Employee experience












IBM champions all diverse communities of IBMers and supports every employee to thrive and bring their authentic selves to work

Accountability

IBM harnesses data transparency and AI to enable accountability, action and outcomes for increased diversity representation and inclusion at every level of our company

Our ESG Commitments

Our commitment to creating Ethical Impact, Equitable Impact, and Environmental Impact includes targets. Updates through the end of calendar year 2022 for those targets are as follows:

Ethical Impact	Equitable Impact	Environmental Impact
<p>Include technology ethics education in training for IBM ecosystem partners, reaching 1,000 partners by end of 2022</p> <p> Achieved by target date We exceeded our target to train 1,000 ecosystem partners in technology ethics in 2022.</p>	<p>Skill 30 million people globally by 2030</p> <p> Commitment in progress Since January 2021, over 7 million* learners have enrolled in IBM courses.</p>	<p>Reach net-zero operational greenhouse gas emissions by 2030</p> <p> Commitment in progress In 2022, we reduced emissions 63.3% against base year 2010, adjusted for acquisitions and divestitures, placing IBM on track to meet its GHG emissions reduction goal.</p>
<p>Train 1,000 technology suppliers in technology ethics by 2025</p> <p> New commitment in 2023</p>	<p>\$250 million investment in apprenticeship and new-collar programs by 2025</p> <p> Commitment in progress</p>	<p>Divert 90% (by weight) of IBM's total nonhazardous waste from landfill and incineration by 2025</p> <p> Achieved annual target in 2022 In 2022, we diverted 93.8% (by weight) of our total nonhazardous waste from landfill and incineration. We are working to reduce the amount of diverted waste sent to waste-to-energy processes from the 11.9% (by weight) achieved in 2022 to less than 10%.</p>
<p>Annual Incentive Program includes a modifier to drive accountability in improving executive diversity representation</p> <p> Commitment in progress Executive representation of women globally, as well as Black and Hispanic executives in the U.S., excluding Red Hat, improved by 0.3 points, 0.7 points and 0.3 points, respectively in 2022. This improvement did not increase the incentive score. The executive incentive program will continue to include a diversity modifier and our goal remains to close the gap in executive representation in these key areas.</p>	<p>Log 4 million volunteer hours by 2025</p> <p> Commitment in progress Since January 2022, IBMers logged over 437,000* volunteer hours towards our goal.</p>	<p>Document 100 client engagements or research projects in which IBM solutions have enabled demonstrable environmental benefits by 2025</p> <p> Commitment in progress Since January 2021, we have documented 40* such engagements or projects.</p>
<p>Engage 100% of suppliers on sound practices including social and environmental responsibility, ethics, and risk planning</p> <p> Commitment in progress</p>	<p>15% of first tier supplier diversity spend from Black-owned suppliers by 2025</p> <p> Commitment in progress In 2022, 6.9% of our first-tier supplier diversity spend was with Black-owned suppliers.</p>	

Annual Incentive Program includes a modifier to drive accountability in improving executive diversity representation

Commitment in progress

Executive representation of women globally, as well as Black and Hispanic executives in the U.S., excluding Red Hat, improved by 0.3 points, 0.7 points and 0.3 points, respectively in 2022. This improvement did not increase the incentive score.

The executive incentive program will continue to include a diversity modifier and our goal remains to close the gap in executive representation in these key areas.

Diversity-Linked Executive Compensation

To reinforce our focus on improving the diverse representation of our workforce, we link executive compensation with the company's performance in key diversity areas. A modifier for diversity results is included in the annual incentive program for our executives globally and is based on improvement in executive representation for women globally and U.S. underrepresented minority (URM) groups (specifically, Black and Hispanic) for our executives in the U.S. Our goal remains to improve and close the gap in representation.

“It’s a signal to the world that we can create a better society going forward, just by taking a look at who we hire, how we hire, how we promote, and how we are authentic to the very value of equity.”

Nigel Pretence

Design Director for Digital Growth and Commerce, Chair for IBM’s Racial Equity in Design Initiative

Champion diversity

Every one of us is a complex combination of diverse characteristics. Learn more about other communities and embrace all aspects of identity.

Black →	DiversAbility →	Hispanic →
Indigenous →	LGBTQ+ →	Pan-Asian →
Veterans →	Women →	



Women's Be Equal Woman Tee
\$18.75



Pan Asian Tee
\$9.95
Was: \$25.00