Business Roundtable

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July 6, 2015

The Honorable Brent Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Secretary Fields:

Re: File Number S7-07-15
Proposed Rules for Implementing the Pay Versus Performance Disclosure Provision of Section 953(a) of the Dodd-Frank Wall Street Reform and Consumer Protection Act

This letter is submitted on behalf of Business Roundtable, an association of the chief executive officers of leading U.S. companies. Our member companies produce $7.2 trillion in annual revenues and employ more than 16 million employees worldwide. Business Roundtable companies comprise more than a third of the total value of the U.S. stock market, annually pay more than $230 billion in dividends to shareholders, generate more than $470 billion in sales for small and medium-sized businesses, and invest $190 billion in research and development – equal to 70 percent of U.S. private research and development spending. Our members also give more than $3 billion a year in combined charitable contributions.

We appreciate the opportunity to comment on the rules proposed by the U.S. Securities and Exchange Commission (SEC or Commission) to implement Section 953(a) of the *Dodd-Frank Wall Street Reform and Consumer Protection Act* (Dodd-Frank Act), as set forth in the Commission's accompanying proposing release.

As explained below, we believe the prescriptive nature of the proposed rules would add to investor information overload and would lead to a result inconsistent with the objectives set forth by the Senate Banking Committee. We believe a principles-based approach would best serve investors and meet the Committee's and Commission's objectives, and we outline recommendations for taking such an approach below.

Companies have already addressed Section 953(a)'s goals of providing investors with pay versus performance information

The proposed rules are a poignant example of counterproductive requirements that increase the disclosure burden on companies while not providing investors with useful or accurate information. Following developments in recent years, including the Commission's adoption of say-on-pay rules, many companies have developed meaningful pay-for-performance disclosures that provide their investors with clear and useful information on the relationship between the company's performance and its executive compensation program. For these companies, new regulation is unnecessary; the effect of shareholder engagement through the say-on-pay rules, together with best practices fostered through the initiatives of groups such as Business Roundtable, have already addressed the goals of Section 953(a).

The proposed rules are overly prescriptive and offer no flexibility

For companies that may not be providing pay-for-performance disclosures, we strongly believe the Commission should take an appropriately flexible approach in proposing rules to implement Section 953(a) of the *Dodd-Frank Act* to systematize these effective disclosure practices. Instead, the Commission is choosing to go beyond the *Dodd-Frank Act's*[1] requirements and proposing lengthy, one-size-fits-all disclosure—without considering whether that disclosure is appropriate for a company's executive compensation program or informative to its investors. Practically speaking, under the proposed rules, companies will be required to provide lengthy explanations of the mandated disclosure. This will be required, regardless of whether the prescribed presentation is representative of the goals and operation of their executive compensation program and its relationship to their financial performance.

The proposed rules make the problem of proxy statement overload worse

For the reasons discussed below, the proposed rules will force companies to explain why the mandated disclosure is *not* reflective of the relationship between executive compensation and the company's financial performance. This will merely add to the problem of investor information overload.

Thus, the approach taken by the Commission in the proposed rules is inconsistent both with the

[1] The Commission concedes in the proposing release that there are other ways in which the rules could measure pay-versus-performance and comply with the mandate of Section 953(a) of the *Dodd-Frank Act*. *See, for example*, 80 Fed. Reg. 26,331 (May 7, 2015), fn 19 ("We recognize that financial performance of the registrant is a broad term and can mean different things to different registrants"). In addition, in response to commenters recommending a more principles-based approach, the Commission states in the proposing release that "[s]uch an approach could have the potential to allow shareholders to more directly observe how management views the alignment of pay and performance at a given registrant, and might reduce reporting costs." *Id.* at 26,354.

statement by the Senate Banking Committee that the rules should not be overly prescriptive[2] and with the Commission's commitment to investigate whether "investors need and are optimally served by the detailed and lengthy disclosures about all the topics that companies currently provide in the reports they are required to prepare and file."[3]

A principles-based approach would fulfill the objectives of the Senate Banking Committee and Commission

Our recommendations below are designed to support the objectives stated by the Senate Banking Committee and the Commission and satisfy the mandate of Section 953(a) of the *Dodd-Frank Act*.

Our principal recommendation is that the Commission limit its rules to what is actually required by Section 953(a) of the *Dodd-Frank Act* and adopt a principles-based approach that permits companies to provide meaningful disclosure to their investors. Section 953(a) of the *Dodd-Frank Act* is a "company-centric" provision; nothing in it requires the SEC's rules to create cross-company comparison. Yet, the Commission states in the proposing release that "our proposed amendments would require registrants to provide disclosure that can be compared across registrants";[4] comparability is a theme throughout the proposing release, as the Commission disregards approaches that would "limit comparability across registrants."[5] However, the SEC does little in the proposing release to demonstrate that the proposed rules will be effective in producing this broad-based comparability or that the benefits of attempting to do so outweigh the related costs. The Commission's effort to create comparability will produce tortured disclosure that far too often will be immaterial – if not misleading or confusing – to investors.

Companies should be permitted to determine the most appropriate measures

To better align the proposed rules to a more principles-based approach, we recommend the Commission make a few critically important changes. Specifically, the Commission should revise the proposed rules to mandate a clear discussion and/or graphical presentation of the relationship between compensation actually paid and financial performance that: (1) permits companies to choose their most relevant measure of financial performance; (2) permits companies to determine their most appropriate measure of "executive compensation actually paid," provided that this measure is disclosed and changes to it are articulated; and (3) provides companies a transition period.

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[2] *See* Report of the Senate Committee on Banking, Housing and Urban Affairs to accompany S. 3217, S. REP. NO. 111-176, at 135 (2010).

[3] "The Path Forward on Disclosure," Chair Mary Jo White, Speech before the National Association of Corporate Directors (Oct. 15, 2013), *available at* http://www.sec.gov/News/Speech/Detail/Speech/1370539878806.

[4] *See* 80 Fed. Reg. 26,331 (May 7, 2015). The Commission also states: "[o]ur proposal is designed, in part, to enhance comparability across registrants." *Id*. at 26,340.

[5] *Id.* at 26,337.

If the proposed rules are adopted without these revisions, the company-specific information required by Section 953(a) of *Dodd-Frank* will be lost in lengthy explanations needed to reconcile the SEC's proposed disclosure with disclosure that provides investors with useful information. As currently proposed, the rules would require companies to use total shareholder return (TSR) as the sole measure of financial performance, even though TSR may not be the most meaningful definition of financial performance for every company. The rules also would require companies to "use the information provided in the table … to provide a clear description of the relationship" between (1) executive compensation actually paid and the company's TSR and (2) the company's TSR and the TSR of the company's peer group. Given the Commission's acknowledgement that there are numerous ways to assess financial performance and a wide variety among companies' executive compensation arrangements, there is no basis to expect that the proposed rules will result in meaningful – let alone material – disclosures.

As the Commission is aware, there are many types of compensation, performance periods, performance measures, pay goals, vesting events, payment dates, forfeiture events and other factors that feed into each company's executive compensation program. This diversity reflects innumerable variables, but some of the more obvious are differences in operating cycles, operating structures, product and service mix, approaches to R&D, sales and marketing and the company's target client base. The premise that all of these factors will clearly relate to annual cumulative TSR for all, or even a majority of, companies is not supported in the release and, we believe, is unsupportable.

These matters are complex and require boards and compensation committees to weigh various factors and exercise judgment as to what are the best measures to assess the performance of executives. Yet, because companies would be required to "use the information provided in the table" to provide a "clear description of the relationship" between pay and performance, many companies will be required to explain why the disclosure does not accurately reflect that relationship – either because TSR is an unrepresentative measure of the company's performance or because TSR fails to capture the complexities of the company's unique compensation program. Moreover, as noted by Commissioners Daniel Gallagher and Michael Piwowar in their statements at the open meeting,[6] the proposed rules' focus on TSR may emphasize short-term stock price improvement over the creation and possibly at the expense of long-term shareholder value – a concern expressed by many leading institutional shareowners.

The proposed rules also would require companies to provide peer group data, including a

[6] "Dissenting Statement at Open Meeting Proposing Mandated Pay versus Performance Disclosures," Commissioner Daniel M. Gallagher (Apr. 29, 2015), *available at* http://www.sec.gov/news/statement/dissent-proposing-mandated-pay-versus-performance-disclosures.html; "Improving Transparency for Executive Pay Practices," Commissioner Michael S. Piwowar (Apr. 29, 2015), *available at* http://www.sec.gov/news/statement/improving-transparency-for-executive-pay-practices.html.

description of the relationship between company TSR and the TSR of the company's peer group. This could result in lengthy disclosures – unrelated to executive compensation – on factors affecting stock price performance of the company's peers. This requirement, which is not necessary under Section 953(a) of the *Dodd-Frank Act*, will likely require an almost company-by-company review of the specific factors affecting TSR. By extending the requirements to include peer group data, the Commission exacerbates companies' disclosure burden and the problem of information overload, again without providing a clear explanation of why this information is necessary or informative. Further, under the proposed rules, companies would be liable under Section 18 of the *Exchange Act* for the peer group data that they disclose, despite being unable to verify the accuracy of the information. This approach is inappropriate and the final rules should clarify that companies will not have liability under the *Exchange Act* for peer group data.

The Commission's prescriptive formula for calculating "executive compensation actually paid" also is unlikely to be meaningful for every company. For example, the Commission chose to use the accounting fair value of equity awards at their vest date, instead of the "intrinsic value"; thus, the value of each stock option will exceed the "spread" that would have been realized by an executive if the option had been exercised on the day it vested. This is impractical given that many executives do not exercise options until years after the awards are vested. The Commission's formula also does not account for certain forfeiture events (e.g., clawback provisions), which introduces another element of uncertainty due to company assumptions. In light of the other mandates of the *Dodd-Frank Act*, these factors are likely to skew pay-versus-performance results for some companies.

Moreover, the proposed rules would require companies to aggregate the compensation of multiple named executive officers and principal executive officers. Given that the pay of incoming and departing executive officers frequently diverges from a company's established executive compensation program – for reasons such as retention and transition – this approach will further distort pay-versus-performance results. Thus, we recommend that the Commission permit each company to choose the measure of financial performance most relevant to the company, and determine the appropriate elements of compensation to include in calculating "executive compensation actually paid," provided that such measure and calculations, and any year-over-year changes, are articulated. This approach would provide investor more useful information and satisfies the requirements of Section 953(a) of the *Dodd-Frank Act*.

Companies should be provided with a transition period

Finally, the proposed rules do not provide companies with a transition period for compliance following the effective date. This means that companies could be required to comply with very little time to determine how best to provide the required disclosure and whether to provide supplemental disclosure. We suggest that the rules provide companies with a transition period, so that companies do not need to comply before the fiscal year commencing immediately after the one-year anniversary of the effective date of the final rules.

In summary, we note that providing for a more principles-based approach is consistent with Section 953(a) of the *Dodd-Frank Act*. Section 953(a) does not require the Commission to impose a prescriptive approach for assessing pay-versus-performance across companies, a limited measure of financial performance, or a narrow definition of "executive compensation actually paid." Therefore, in our view, the Commission's goal should be to enhance the current progress of companies on pay-for-performance disclosures and provide clarity and flexibility to companies looking to adopt these disclosures – instead of imposing restrictive requirements that will produce meaningless disclosure.

Thank you for considering our comments. We would be happy to discuss our concerns or any other matters that you believe would be helpful. Please contact me or Michael Ryan of Business Roundtable at [redacted].

Sincerely,

John A. Hayes

John A. Hayes
Chairman, President and Chief Executive Officer
Ball Corporation
Chair, Corporate Governance Committee
Business Roundtable

JH/mr

C: The Honorable Mary Jo White, Chair
The Honorable Luis A. Aguilar, Commissioner
The Honorable Daniel M. Gallagher, Commissioner
The Honorable Kara M. Stein, Commissioner
The Honorable Michael S. Piwowar, Commissioner
Mr. Keith F. Higgins, Director, Division of Corporation Finance
Ms. Anne K. Small, General Counsel and Senior Policy Director