



1717 Rhode Island Avenue, NW
Suite 800
Washington, DC 20036

Telephone 202.872.1260
Facsimile 202.466.3509
Website brt.org

October 6, 2011

Ms. Elizabeth M. Murphy
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

W. James McNerney, Jr.
The Boeing Company
Chairman

David M. Cote
Honeywell International, Inc.
Vice Chairman

Andrew N. Liveris
The Dow Chemical Company
Vice Chairman

Robert A. McDonald
The Procter & Gamble
Company
Vice Chairman

John Engler
President

Larry D. Burton
Executive Director

Johanna I. Schneider
Executive Director,
External Relations

LeAnne Redick Wilson
Executive Director,
Membership

**Re: File Number S7-36-11
Implementing the Review of Existing Securities and Exchange
Commission Regulations in light of Executive Order 13579**

Dear Ms. Murphy:

This letter is submitted on behalf of Business Roundtable, an association of chief executive officers of leading corporations with a combined workforce of more than 14 million employees in the United States and over \$6 trillion in annual revenues. Member companies comprise nearly a third of the total value of the U.S. stock market and represent nearly a third of all corporate income taxes paid to the federal government. Annually, member companies pay \$163 billion in dividends to shareholders and the economy. Roundtable companies give more than \$9 billion a year in combined charitable contributions. They are technology innovation leaders, with \$150 billion in annual research and development spending – nearly half of the total private R&D spending in the U.S.

We are submitting this letter in response to the September 6, 2011 request for public comments by the U.S. Securities and Exchange Commission (the “SEC” or the “Commission”) regarding the development, scope, and elements of a plan for the retrospective review of its existing “significant” regulations. The Roundtable commends the Commission for undertaking this process. As we have previously stated, the best regulations/regulatory programs help provide certainty for business investment decisions while achieving their regulatory objective in a cost-effective and efficient manner and in a manner that achieves a high compliance rate.¹ The implementation of a robust retrospective review process at the SEC would represent a significant step toward the realization of this goal.

¹ BUSINESS ROUNDTABLE: ACHIEVING SMARTER REGULATION (2011), available at <http://businessroundtable.org/studies-and-reports/achieving-smarter-regulation/>.

As an initial matter, it is important to note that when the Commission - or any regulator - engages in cost and benefit analysis in connection with the adoption of a new rule, such analysis is speculative as the benefits and costs of a rule cannot be quantified until the rule has been tested.² Such benefits and costs are informed by the rulemaking process, but the analysis can never represent more than an estimate. Accordingly, a retrospective review of a rule offers the opportunity to determine, based on empirical data, the actual costs and benefits of the rule.

Effective retrospective review demands a fresh perspective.

A retrospective review process should be conducted with a fresh perspective. While those agency staff members who worked on a rule's adoption have important knowledge to contribute, a retrospective review of "significant" rules should be conducted under the oversight of those who can take a fresh look at the new evidence that will be available following adoption of the rule. They will be in the best position to recommend to the Commission whether the rule is accomplishing the Commission's goals and if so, whether such goals are being accomplished in the most cost-effective manner. In this regard, we suggest that the Commission's Division of Risk, Strategy and Financial Innovation might be the appropriate group to have such oversight responsibility, with input from the other relevant division(s). The increased input of the Commission's economists would heighten the focus on the underlying economics of the "significant" rules being reviewed.

Input from affected parties should assist in determining which rules are "significant."

The determination of which rules are "significant" and the subsequent prioritization of the order in which those rules will be reviewed should be guided by input from affected parties. The entities that bear the cost of compliance, and those that are perceived as benefiting from it, possess the most accurate assessment not only of the costs and benefits of a rule, but also of how effectively the rule is functioning in practice. Accordingly, on an ongoing basis, the Commission actively should invite affected parties and their advisors to provide it with information, whether through meetings or written submissions, regarding those rules that are perceived as being excessively burdensome or ineffective. The Commission also should formally solicit, on an annual basis, comments on which of its rules are most in need of review and make the comments publicly available. Several other federal agencies have implemented such a process, and not only disclose the comments they receive, but also provide an explanation of the agencies' response to those comments.³

² Michael Greenstone, the Chief Economist of the Council of Economic Advisors has opined that this is the very problem with the regulatory system. "Toward a Culture of Persistent Regulatory Experimentation and Evaluation." *See also*, Katz, Jonathan G., "Reviewing the SEC, Reinvigorating the SEC," 71 U. Pitt. L. 489, at 514 (2009).

³ The Environmental Protection Agency ("EPA"), the Department of Transportation ("DOT"), the Federal Trade Commission ("FTC"), the Department of the Interior ("DOI"), and the Food and Drug Administration ("FDA") are among those that provide comment periods for the public to suggest rules in need of retrospective review. After consideration of the comments, the DOT discloses every comment it receives while the FDA and DOI

In addition to input from affected parties, the Commission should consider the following factors in determining which “significant” rules to review:

- Significant changes in technology or other changes (*e.g.*, outdated monetary thresholds or disuse of certain exemptions) that could impact the costs of compliance with a rule;
- The number of entities affected, as well as both macroeconomic significance and whether effects are concentrated on one or a small number of entities;
- New information or developments concerning the subject or purpose of the rule, (*e.g.*, recent court decisions or economic studies);
- Whether states have preempted the need for continued federal regulation in a particular area; and
- Whether the rule is duplicative, in whole or in part, of a rule enacted by another federal agency.

Once the Commission identifies the “significant” rules that should be the subject of retrospective review, it must prioritize which of those rules are in most urgent need of review. The highest priority should be given to those rules that are perceived as the most burdensome; particularly where the Commission receives data indicating that the actual cost of compliance with a rule far exceeds the estimates considered by the Commission in adopting the rule.

The retrospective review of “significant” rules should be conducted in a transparent manner.

When the Commission has determined which “significant” rules will be reviewed in the coming year, it should publish a list of the rules selected for review⁴ and other relevant information, including:

- The reasons behind the SEC’s determination to review the rule;
- The assumptions and data that it considered in determining to review the rule; and
- Any additional data or other information it would find helpful in reviewing the rule.

The SEC also should publish and request comment on the assumptions and data that it is planning to use in its retrospective review of each “significant” rule. This process would allow affected parties, as well as third parties, such as academics and others, to review the data and provide input to the Commission. In particular, the SEC should formally invite the submission of empirical cost and benefit data from those affected by the rule, as well as from their advisors. For example, in the case of disclosure rules, this would include the companies required to make

provide descriptions of the comments. Both the DOT and the FDA provide explanations for their response to the comments they receive.

⁴ This is a common practice in the retrospective review process of other government agencies. For example, In its proposed plan for retrospective review, the EPA stated that it would aid the public in tracking its progress by publishing which rules are to be reviewed in the Semiannual Regulatory Agenda and online (on its “Rulemaking Gateway” page). Similarly, the FTC, DOT and DOL have each launched new websites that provide information regarding their retrospective review programs.

the disclosures as well as institutional and other investors who are the users of the required information. These entities are in the best position to provide concrete data that detail the cost of compliance with, and the benefits of, “significant” rules. In fact, the U.S. Government Accountability Office has noted that the absence of this type of data in the review process has long hindered retrospective reviews at other agencies.⁵

The review process should consist of a robust cost and benefit analysis of “significant” rules.

The review process itself should incorporate the empirical data the SEC collects from those affected by the rule pursuant to the process suggested above. While the benefits of a rule may be more difficult to quantify than its costs, the Commission will be in a better position to evaluate these benefits after it has solicited data from the public. Where the Commission has not received sufficient input from affected parties with respect to the costs and benefits of a “significant” rule, it may need to consider affirmatively soliciting such information through voluntary surveys or otherwise. In addition, it should consider financial and economic literature regarding the subject matter of the rule.

The Commission also should integrate its retrospective review process into the SEC’s current review initiatives under the Regulatory Flexibility Act and the Paperwork Reduction Act, in order to make the rule review process as efficient and cost-effective as possible.

The results of the review process should inform future rulemaking.

The information that the Commission obtains in connection with the retrospective review process, particularly actual cost and benefit data, should be used to inform the cost and benefit analyses done in connection with the adoption of future rules. For example, if the retrospective review of an existing “significant” rule indicates that the Commission’s pre-adoption cost estimates differ greatly from the actual costs, the Commission should update the assumptions it uses in its cost benefit analysis when evaluating future rules.⁶

In adopting new “significant” rules, the Commission should facilitate their retrospective review.

As noted above, when the SEC engages in cost and benefit analysis before it adopts a new rule; such analysis can only be an estimate. The impacts of a new rule—both its actual costs and benefits—do not become evident for months or even years after it is implemented. A retrospective review of a rule thus provides the Commission the first opportunity to review the

⁵ U.S. Government Accountability Office, *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews*, GAO-07-791, July 2007, Introduction.

⁶ Two recently proposed laws would specifically require retrospective review of existing regulations, as well as robust cost and benefit analysis prior to any new rulemaking. See “The Financial Regulatory Responsibility Act of 2011,” (S.1615) introduced by Senators Mike Crapo and Richard Shelby; “The SEC Regulatory Accountability Act” (H.R. 2308), introduced by Congressman Scott Garrett.

actual costs and benefits that its rule imposes.⁷ Going forward, we suggest that to facilitate the retrospective review of “significant” new rules, the Commission provide additional information in the adopting release of such rules. This information should include:

- A timetable for review of the new rule, which review should occur within one to three years of its adoption;
- An invitation to those parties affected by the rule, as well as their advisors, to collect data regarding the costs of compliance and the benefits provided by the rule;
- Specific goals which the rule is seeking to address; and
- Specific criteria and metrics against which the cost and benefit data can be measured.

Pre-planning of this nature would enhance the utility of future retrospective reviews. In a 2007 study, the U.S. Government Accountability Office concluded that “agencies can be better prepared to undertake reviews if they have identified what data will be needed to assess the effectiveness of a rule before they start a review and, indeed, before they promulgate the rule. If agencies fail to plan for how they will measure the performance of their regulations, and what data they will need to do so, they may continue to be limited in their ability to assess the effects of their regulations.”⁸

In the case of those rules for which the Commission anticipates the costs and benefits are particularly likely to change over time, it could include a “sunset” provision in the rule. Pursuant to such a provision, the rule would expire at the end of the stated period unless the Commission, after a thorough review, determined to retain the rule. A sunset provision would not only facilitate the review process of particularly time-sensitive rules, but also would prioritize the review of those rules.

The Commission should engage in a periodic review of *all* of its rules.

While “significant” rules should be the subject of the most robust retrospective review process, all SEC rules and forms should be reviewed on a periodic basis to remove or revisit those that are duplicative, overly burdensome, or anachronistic. While the review of those rules deemed to be “significant” pursuant to the review process laid out above should be the focus of the Commission’s review initiatives, all rules should be reviewed at least once per decade.

To accomplish this large-scale review, we recommend that the Commission consider creating a task force, on at least a once-per-decade basis, to review all SEC rules and forms⁹ that have not been reviewed as part of the retrospective review of “significant” rules. In this regard, we note that the SEC has had success with such task forces in the past. For example, its Task Force on

⁷ Greenstone, Michael, “Toward a Culture of Persistent Regulatory Experimentation and Evaluation.”

⁸ U.S. Government Accountability Office, *Reexamining Regulations: Opportunities Exist to Improve Effectiveness and Transparency of Retrospective Reviews*, GAO-07-791, July 2007, 49.

⁹ In the case of forms, we recommend that the task force prioritize the review of those forms that are most frequently used.

October 6, 2011

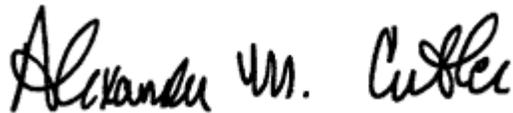
Page 6

Disclosure Simplification recommended the elimination of 81 rules and 22 forms and the modification of dozens of other rules and forms when it completed its seven-month review in 1996.

* * * * *

Thank you very much for considering our comments. We would be happy to discuss them, or any other matter that you believe would be helpful. Please contact Larry Burton, Executive Director of Business Roundtable, at 202-872-1260.

Sincerely,



Alexander M. Cutler
Chairman and Chief Executive Officer, Eaton Corporation
Chair, Corporate Governance Committee, Business Roundtable

C: The Honorable Mary L. Schapiro, Chairman
The Honorable Elisse B. Walter, Commissioner
The Honorable Luis A. Aguilar, Commissioner
The Honorable Troy A. Paredes, Commissioner
Mark D. Cahn, General Counsel
Craig Lewis, Director, Division of Risk, Strategy, and Financial Innovation