300 New Jersey Avenue, NW
Suite 800
Washington, DC 20001

Telephone 202.872.1260
Facsimile 202.466.3509
Website brt.org

March 23, 2017

The Honorable Michael S. Piwowar
Acting Chairman
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549

Dear Chairman Piwowar:

Re: February 6, 2017 Statement on Reconsideration of Pay Ratio Rule Implementation

This letter is submitted on behalf of Business Roundtable, an association of chief executive officers of leading U.S. companies. Our member companies produce more than $6 trillion in annual revenues and employ nearly 15 million employees worldwide. The combined market capitalization of Business Roundtable member companies is the equivalent of nearly one-quarter of total U.S. stock market capitalization, and they annually pay $226 billion in dividends to shareholders, generate $412 billion in sales for small and medium-sized businesses and invest $103 billion in research and development.

We are submitting this letter in response to your February 6, 2017 request for public comments on the implementation of the CEO pay ratio rule, which requires a public company to disclose the ratio of the median annual total compensation of all employees to the annual total compensation of the chief executive officer. The rule was adopted by the Securities and Exchange Commission (SEC) pursuant to Section 953(b) of the *Dodd-Frank Wall Street Reform and Consumer Protection Act*.

Business Roundtable has significant concerns with the CEO pay ratio rule – both in its current form and in principle – which are outlined in this letter. Business Roundtable has a deep history of supporting the notion of transparency when it comes to information that is material to the investing public, including with respect to executive compensation matters. The requirement that a company disclose the ratio of its CEO's compensation to that of its median employee, however, is not only immaterial to investors when evaluating a company's overall executive compensation, it also is both costly and harmful to companies, employees and investors. Pending repeal of Section 953(b), we recommend that the rule be re-examined and reformulated in a more constructive, less burdensome manner.

<u>The CEO Pay Ratio Rule Is Burdensome to Companies and Immaterial to Understanding Their Compensation Practices</u>

As many commenters have noted, complying with the CEO pay ratio rule is costly and burdensome for U.S. public companies of all sizes.[1] According to a survey of Business Roundtable members, all of the respondents confirmed that the CEO pay ratio rule has imposed, and will continue to impose, significant compliance costs, and certain members expect that compliance costs could reach into the millions of dollars and estimate that hundreds or even thousands of working hours will be spent on compliance efforts. Identifying the median employee is not a simple task, but one that requires gathering information from many different sources while coordinating with external advisers to ensure the efforts are compliant with the technical requirements of the CEO pay ratio rule.

As discussed in more detail below, this is particularly complicated and costly for a company with employees located in different jurisdictions throughout the world. Not only will that company need to engage in a large manual data collection effort, but it also must do so in the context of complex international data privacy laws. In addition to actually identifying the median employee, calculating his or her total annual compensation and drafting the required narrative disclosure, a company must be prepared to manage reactions to the pay ratio.

Despite the significant compliance costs, the CEO pay ratio fails to provide material information to investors about a company's compensation of its CEO or its employees and will not enhance investors' understanding of a company's compensation practices. The compensation of each position within a company is, and will continue to be, determined by the market. This is particularly true of the CEO's compensation, which already is subject to extensive disclosure requirements. When determining CEO compensation, a public company's compensation committee generally must consider how competitors compensate their CEOs, the nature and business of the company, tax requirements and shareholders' perspectives on the company's executive compensation practices. This detailed process depends on the facts and circumstances of a particular company and will not be aided or changed by the immaterial disclosure required by the CEO pay ratio rule. Moreover, existing governance processes and disclosure requirements already provide significant transparency on how executive

---

[1] See Comments on Pay Ratio Disclosure from Avery Dennison Corporation, available at https://www.sec.gov/comments/s7-07-13/s70713-386.pdf (last visited March 8, 2017); Center on Executive Compensation, available at https://www.sec.gov/comments/s7-07-13/s70713-572.pdf (last visited March 8, 2017); Dover Corporation, available at https://www.sec.gov/comments/s7-07-13/s70713-440.pdf (last visited March 8, 2017); Eaton, available at https://www.sec.gov/comments/s7-07-13/s70713-561.pdf (last visited March 8, 2017); FEI Company, available at https://www.sec.gov/comments/s7-07-13/s70713-220.htm (last visited March 8, 2017); FuelCell Energy, Inc., available at https://www.sec.gov/comments/s7-07-13/s70713-304.pdf (last visited March 8, 2017); Hyster-Yale Materials Handling, Inc., available at https://www.sec.gov/comments/s7-07-13/s70713-522.pdf (last visited March 8, 2017); NACCO Industries, Inc., available at https://www.sec.gov/comments/s7-07-13/s70713-519.pdf (last visited March 8, 2017); and Business Roundtable, available at https://www.sec.gov/comments/s7-07-13/s70713-1573.pdf (last visited March 8, 2017).

compensation is designed and determined, and shareholders have meaningful opportunities to weigh in on executive compensation practices through their proxy voting and the Rule 14a-8 shareholder proposal process.

<u>The CEO Pay Ratio Rule Will Work Contrary to the SEC's Stated Purpose</u>

We also are concerned by evidence indicating that the ratio will be used in ways contrary to the rule's stated purpose. According to the SEC, the purpose of the CEO pay ratio rule is to provide a company-specific metric that can assist in a shareholder's evaluation of a company's executive compensation practices.[2] The SEC clarified that there are a variety of factors that can cause the ratios to differ among companies,[3] and the CEO pay ratio rule was not designed to facilitate a comparison from one company to another.[4] Nonetheless, various commenters on the rule have publicly indicated their intention to attempt to use the CEO pay ratio as a tool to compare companies when making investment decisions.[5]

The practice of comparing companies based on CEO pay ratios is highly problematic for a variety of reasons. For example, as noted above, the CEO pay ratio fails to convey material information to investors about a company's compensation or performance and fails to consider a company's business model or staffing strategy; therefore, it is useless as a tool to compare companies. Moreover, executive and employee compensation depends on, among other things, the specific facts and circumstances of the individual, company and industry involved, and, as a result, it is very difficult to compare compensation practices of companies of different sizes and in different industries and regions. It is even more difficult to attempt to do so using a general and abstract figure like the CEO pay ratio. The use of the CEO pay ratio as a tool to compare companies – and one that is largely irrelevant and immaterial –has the potential to result in significant harm to companies and their shareholders.[6]

---

[2] Pay Ratio Disclosure, 17 C.F.R., Parts 229 and 249 (2015), page 9.
[3] Pay Ratio Disclosure, 17 C.F.R., Parts 229 and 249 (2015), page 12.
[4] Pay Ratio Disclosure, 17 C.F.R., Parts 229 and 249 (2015), page 12.
[5] The CEO pay ratio disclosure "lends itself to comparison stock shopping within an industry…" (Kenneth Ratcliff's Comments on Pay Ratio Disclosure, available at https://www.sec.gov/comments/s7-07-13/s70713-28.htm (last visited March 8, 2017).) The CEO pay ratio disclosure "…will help me know where I want to spend and invest my money." (Debbie Notkin's Comments on Pay Ratio Disclosure, available at https://www.sec.gov/comments/s7-07-13/s70713-46.htm (last visited March 8, 2017).) "Investors will be able to…compare companies within industries." (Comments on Pay Ratio Disclosure of Laurie McClain, Accredited Investment Fiduciary®, Socially Responsive Financial Advisors/First Affirmative Financial Network, available at https://www.sec.gov/comments/s7-07-13/s70713-176.pdf, and of Stephen J. Schueth, President, First Affirmative Financial Network, available at https://www.sec.gov/comments/s7-07-13/s70713-308.pdf (last visited March 8, 2017).) "As an investor, this information is important for my ability to determine the sustainability of a corporation, especially in comparison to similar companies." (Nicholas Brinza's Comments on the Statement on the Commission's Pay Ratio Rule, available at https://www.sec.gov/comments/pay-ratio-statement/cll3-131735.htm (last visited March 8, 2017).)
[6] Another example of an unintended consequence of the pay ratio disclosure rule has arisen in Portland, Oregon. The Portland City Council recently adopted legislation imposing a city income surtax on certain companies subject to the CEO pay ratio rule. The surtax would be triggered when CEO compensation exceeds the median employee compensation by an arbitrary threshold and increases when a higher threshold is met. (See Ordinance No. 188129,

<u>The CEO Pay Ratio Rule Is Misleading</u>

In addition, the CEO pay ratio actually may be misleading to a company's shareholders. Most public company CEOs have compensation packages that skew more heavily toward performance-based and equity-based awards than the compensation packages of other employees. Paradoxically, therefore, the difference between CEO pay and median worker pay will likely increase when the company is performing well and will likely decrease when the company is performing poorly. This means that the worse a company performs, the "better" its CEO pay ratio may be perceived. It seems odd that as a company's anticipated "pay-for-performance" disclosure improves its CEO pay ratio will likely become "worse."

A company's selected business model and staffing strategy will also manifest itself in the metric, which could lead to poor or inaccurate interpretations. As noted earlier, the metric does not consider regional, country or local employment markets, which could significantly affect the median employee. Further, different staffing strategies within or across industries will distort the ratio and could lead to poor investment decisions or affect a company's decisions (e.g., use of part-time workers, outsourcing, use of contractors, use of business support centers in lower-cost countries or regions).

<u>The CEO Pay Ratio Rule Will Cause Internal Discord Among Employees</u>

Another major concern our members have expressed about the CEO pay ratio rule is the ratio's potential impact on employee morale – not as it relates to employees comparing their compensation to the CEO's compensation, but as it relates to employees being provided a tool by which they can compare their compensation to that of their colleagues and the rest of the employee population. Among the rule's requirements is that a company compare its CEO compensation to the compensation of the company's "median employee," as measured by total annual compensation. Regardless of whether a company's CEO pay ratio is 300:1 or 30:1, the rule mandates that essentially half of each public company's employee population learn – through a public filing – that they are paid within the bottom half of the company.

The CEO pay ratio rule thus creates a new metric – median employee compensation – that invites employees and others to compare individual compensation figures within and across companies without sufficient context or relevant market-based factors that generally determine different levels of employee pay within specific regional, country and local employment markets (e.g., supply and demand, education, skill, prior experience, seniority, job

---

§1.12 (A 10% surtax applies to the base tax liability of any company with a CEO pay ratio of at least 100:1 but less than 250:1, and a 25% surtax applies to the base tax liability of any company with a CEO pay ratio of 250:1 or greater).) Other cities and states have either tried, or shown interest in, passing similar legislation aimed at either punishing companies with large differences between CEO pay and median worker pay or rewarding companies with small differences between CEO pay and median worker pay. Inherent in Portland's surtax and the other cities' and states' activities is disparate treatment of companies with differing CEO pay ratios and a heedless disregard for the incentive component of executive compensation.

responsibilities, job location, employment status – i.e., part-time, full-time, seasonal, temporary – and disciplinary history). In addition, employees may learn that their company's median employee compensation is lower than a key competitor's without enough information to better understand the reasons why such a difference may exist (e.g., non-overlapping business lines, cost of living differences at key work sites). Companies will thus be required to spend additional time and resources drafting additional narrative disclosure to explain the ratio and managing reactions to, and internal discord caused by, the ratio.

The SEC Should Amend the Pay Ratio Rule Pending Repeal of Dodd-Frank Section 953(b)

For all of these reasons, among others, we reiterate the significant problems that are posed by the CEO pay ratio rule. Above all, we maintain that the pay ratio disclosure rule serves no material, valid or helpful purpose for investors to make informed investment decisions. Its only use would be providing a means for certain special interests to force companies to devote resources to collect and analyze data in service of their own particular agenda. Pending repeal of Section 953(b), we believe it is important that the rule be re-examined and reformulated in a more constructive, less burdensome manner.

Although we believe further discussions and more research are warranted to identify all changes required to minimize the rule's unintended consequences and reduce compliance costs, we identified several immediate changes that would alleviate some of the compliance burden.

Exclusion of Employees Located Outside of the United States

The CEO pay ratio rule requires, with limited exceptions, that a company include in its total employee population all employees, regardless of location, employed by the company or its consolidated subsidiaries. We maintain that only employees located in the United States should be included for purposes of this calculation; doing so would significantly reduce the cost of compliance, and would at least create a country-specific constant in the many variables that exist in formulating the metric. By changing the rule in this manner, companies could avoid entirely the issue of overcoming non-U.S. data privacy restrictions and the time-consuming and expensive process of trying to rely on the CEO pay ratio rule's data privacy exemption.

For companies with non-U.S. employees, the time and effort spent on either complying with data privacy laws or relying on the CEO pay ratio rule's data privacy exemption is likely to be significant. The international data privacy law regime is complex and ever-changing. To ensure full compliance when trying to identify the company's median employee and such employee's total annual compensation, a company must, among many other requirements, be aware of the types of information that are protected, how such information can be processed and to which countries such data may be transferred. While the tasks of anonymizing and aggregating personal data to avoid the legal limitations on processing and transferring such data may appear to be relatively simple and straightforward, there can be variances among international jurisdictions as to what level and degree of anonymization and aggregation are necessary to render the data un-linkable to the source data. A company that runs afoul of these requirements faces serious consequences. For example, the EU's General Data Protection Regulation provides for penalties of up to 4 percent of a company's global annual turnover for failure to comply with the law. Yet, despite these high penalties, the data privacy exemption afforded by the CEO pay ratio rule involves many time-consuming and expensive steps.[7] Every company subject to the CEO pay ratio rule will essentially be required to become an expert on international data privacy laws (as such laws relate to the information that must be gathered and analyzed to comply with the CEO pay ratio rule, which provides no meaningful information to investors) or spend significant amounts of money hiring external advisers to provide such advice.

According to one study, permitting registrants with employees located outside of the United States to exclude those non-U.S. employees would reduce compliance costs by 47 percent.[8] Certain respondents to our survey indicated that the cost of collecting data relating to non-U.S. employees could constitute up to 90 percent of data collection costs attributable to the pay ratio rule. Gathering the information necessary to comply with the CEO pay ratio rule requires a significant manual data collection effort for non-U.S. employees since many (if not most) companies do not maintain centralized payroll and benefits information for such employees. Furthermore, some of our members are having difficulty ascertaining what constitutes a "consistently applied compensation measure" given the breadth and complexity of their workforces and the variety of compensation and benefit arrangements, including government-provided benefits, that comprise an employee's total compensation package in other jurisdictions.

Although the 5 percent non-U.S. employee *de minimis* exception provides some relief, a company still must undergo an analysis to determine whether that exception applies. Excluding non-U.S. employees entirely would eliminate the costs associated with any such analysis. If the SEC decides not to exclude non-U.S. employees from the CEO pay ratio analysis, we urge the SEC to reconsider the 5 percent threshold and conduct more research to determine whether a different threshold would be more appropriate for the *de minimis* exception. For example, in

[7] To rely on the data privacy exemption provided by the CEO pay ratio rule, a company must first (1) seek an exemption or other relief under any such governing data privacy laws or regulations, (2) identify the specific data privacy law or regulation that would prevent the company from being able to gather the relevant data, (3) draft an explanation of how gathering the data would violate such data privacy law or regulation (including the efforts made by the company to seek an exemption), (4) obtain a legal opinion from counsel that expresses the inability of the company to obtain such information without violating the data privacy laws or regulations and describes the company's inability to obtain an exemption, (5) list the approximate number of employees exempted from such jurisdiction based on the exemption and (6) file as an exhibit the opinion from counsel. See 17 C.F.R. §229.402(u)(4)(i).
[8] See Center on Executive Compensation Comments on Proposed Pay Ratio Disclosure, available at http://www.sec.gov/comments/s7-07-13/s70713-572.pdf (last visited March 8, 2017).

the case of a company that operates globally in over 75 countries, while the 5 percent threshold may exclude possibly half of the countries, the company would still be required to gather information from 30 to 40 countries, each with potentially different payroll systems, reporting requirements and pay structures. For this reason, we also urge the SEC to consider whether it would be more appropriate simply to give a company the flexibility to exclude non-U.S. employees if the company determines that such information is not material to its shareholders.

CEO Pay Ratio Information Should be “Furnished,” Not “Filed”

The CEO pay ratio rule should not require that the pay ratio information be “filed” with the SEC, but instead should be “furnished.” Given the amount of data necessary to be considered and the significant number of estimates, assumptions and judgment calls necessary to produce the ratio, we believe it will be difficult for CEOs and CFOs to verify the information and the ratio sufficiently to certify the results. We note that, with respect to other disclosures, the SEC has provided for “furnished” status where “filing” the disclosures in question poses undue risk due to their relative uncertainty and would have potentially imposed undue liability.

More Time to Comply with the CEO Pay Ratio Rule

We recommend that the SEC extend the compliance date to no earlier than the first fiscal year beginning on or after January 1, 2018, so that registrants have at least two full fiscal years from the effective date to comply. A significant majority of the respondents to our survey confirmed that they would benefit from more time to comply with the CEO pay ratio rule.

Registrants must undertake complex and time-consuming efforts to comply with the CEO pay ratio rule. Although the CEO pay ratio rule provides flexibility regarding how a company determines the employee population from which the median employee is identified, the process of running a meaningful statistical sample requires gathering information for all of its employees. Most companies have no current business purpose for gathering such information. A company also must draft the necessary narrative disclosure that will accompany the ratio itself, which is certain to be lengthy considering the CEO pay ratio rule’s prescriptive requirements.

The need for an extension is even more pronounced if the CEO pay ratio rule continues to require an analysis of a company’s non-U.S. employee population or if the information continues to be “filed” instead of “furnished.” As discussed above, a major portion of the compliance burden relates to gathering and analyzing data for non-U.S. employees. Removing from the analysis that portion of the employee population would reduce the amount of resources and time required to comply with the CEO pay ratio rule. Similarly, if a company is required to file its CEO pay ratio, more time must be afforded to CEOs and CFOs to allow for the proper certification of the accuracy of such figure.

For the reasons stated above, the Division of Corporation Finance also should issue no-action relief allowing companies additional time to comply while the SEC re-examines the CEO pay ratio rule.

Thank you for considering our comments and recommendations. We would be happy to discuss our concerns or any other matters that you believe would be helpful. Please contact Maria Ghazal, General Counsel of Business Roundtable, at [redacted] or [redacted].

Sincerely,

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