Business Roundtable

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April 22, 2015

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

Dear Mr. Fields:

Re: File Number S7-01-15, Proposed Rules for Implementing the Hedging Disclosure Provision of Section 955 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, and 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") to implement Section 955 of the Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), as set forth in the proposing release issued on February 9, 2015 (the "Proposed Rules"). We believe that the Proposed Rules contain several positive features. We also believe some revisions are necessary to focus on information that is material to investors and to clarify certain aspects of the rules.

In response to the SEC's request in the proposing release for information about studies and analyses of companies that have disclosed information about their hedging policies, this letter includes data about the hedging policies at a cross-section of 60 publicly traded companies whose CEOs are members of the Business Roundtable.

A. Hedging Policies of Business Roundtable Companies

Business Roundtable has long been at the forefront of efforts to improve corporate governance. We have been issuing "best practices" statements in this area for over three decades, including *Executive Compensation Principles and Commentary* (2007) and, most recently, *Principles of Corporate Governance* (2012).

In our *Executive Compensation Principles and Commentary*, we advocated the adoption of practices that align the interests of executives and directors with those of shareholders, including executive compensation that reflects both upside potential and downside risk, and stock ownership requirements. In this regard, many institutional investors encourage companies, and many companies have practices, to ban hedging of company securities by executive officers in order to promote this alignment, incentivize appropriate risk-taking and prevent executives from avoiding risks associated with long-term stock ownership.

Consistent with this, nearly all (95%) of a cross-section of 60 publicly traded companies whose CEOs are members of Business Roundtable prohibit hedging of company securities by executive officers,[1] and 85% prohibit hedging by directors.[2] Most of these companies disclose in their proxy statements their policies with respect to executive officers and directors—beyond what is required under current SEC disclosure rules regarding named executive officers. Only a portion of companies disclose in their proxy statements prohibitions on hedging by employees, likely because that information is not material to investors. Moreover, that information often is already publicly available in a company's other governance documents, including the code of conduct/ethics required to be posted on the company's website.

B. Comments on the Proposed Rules

As an initial matter, we commend the SEC for taking a principles-based approach to defining the scope of hedging transactions covered by the Proposed Rules. We also agree that it is appropriate to incorporate the new hedging disclosure requirements into the SEC's corporate governance—rather than its executive compensation—rules. Finally, we support the proposal to require hedging disclosures only in proxy statements, and not in Forms 10-K or registration statements.

There are, however, a few revisions that we believe should be incorporated in the final rules, as discussed below:

1. <u>Limit the hedging disclosures to directors and executives</u>. We urge the SEC to limit the scope of the final rules to directors and executive officers. As the SEC acknowledges in the proposing release, information about the hedging activities of employees below the executive

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[1] Includes one company that discloses that it prohibits hedging by named executive officers.

[2] Based on an April 2015 review of each company's disclosures in filings with the Commission and in corporate governance documents available on their website. These companies may have additional prohibitions on hedging that are not publicly disclosed.

level is not material to investors. Focusing on directors and executive officers is consistent with the legislative history of Dodd-Frank, which states that Section 955 was intended to "allow shareholders to know if *executives* are allowed to purchase financial instruments to effectively avoid compensation restrictions that they hold stock long-term, so that they will receive their compensation even in the case that their firm does not perform."[3]

Limiting the hedging disclosures to directors and executive officers also would further the broader goal—a goal that has become an increasing priority for the SEC, companies and investors—of focusing disclosures on the information that is most relevant to investors and avoiding "information overload."

2. Clarify that the final rules do not apply to transactions in broad-based index funds. As contemplated by the SEC in the proposing release, the final rules should make clear that transactions in a broad-based index that includes a company's equity securities are not hedging transactions within the meaning of the rules. We agree with the statement in the proposing release, "there is a meaningful distinction between an index that includes a broad range of equity securities," and financial instruments that have the purpose or effect of hedging economic exposure to the company's equity securities.

   This clarification would enable companies to disclose that their policies prohibit all hedging in the company's securities even where individuals have the ability to engage in hedging transactions involving a broad-based index that includes company securities. This is the appropriate result given the nature of broad-based indices.

3. Require only a description of a company's relevant policies. The Proposed Rules would require a company to disclose both the categories of transactions that it permits and the categories of transactions that it prohibits. The Proposed Rules would allow a company to state that it prohibits particular categories of transactions, and that it permits all other hedging transactions, or vice versa. Similarly, if a company permits hedging, the Proposed Rules would require the company to disclose the categories of persons who are permitted to engage in hedging transactions and those who are not.

   This approach would require disclosure about the universe of transactions and persons that are *not* covered by a company's hedging policies. This would, in turn, result in disclosure that could become quite detailed, and it will make applying the Proposed Rules difficult in practice because they are largely principles-based and do not include specific definitions of key terms.

   For example, the Proposed Rules would require disclosure about whether companies permit hedging by "designees" of employees, officers and directors, a term that the Proposed Rules do not define or provide guidance on. To satisfy the disclosure requirements in the Proposed Rules, companies that allow some forms of hedging transactions would need to identify a

[3] Report of the Senate Committee on Banking, Housing, and Urban Affairs, S. 3217, Report No. 111-176, at 136 (Apr. 30, 2010) (emphasis added).

potentially expansive list of designees who are not permitted to engage in these transactions. In addition, requiring general disclosure that a company permits "all other hedging transactions" may be overly broad and may not accurately reflect the policy decisions that a company has made with respect to hedging. In this regard, a decision to prohibit certain types of hedging does not mean that a company has affirmatively decided to permit all other types of hedging transactions.

In order to focus the new disclosures on material information, we encourage the SEC to replace these detailed disclosure requirements with a requirement that companies simply describe their relevant policies. This would complement a provision in the Proposed Rules that would require disclosure in "sufficient detail to explain the scope" of permitted hedging transactions.

Finally, in the proposing release, the SEC requests comment on whether to mandate disclosure about hedging transactions that have actually occurred involving Section 16 insiders (directors and officers). We believe this is unnecessary and beyond the scope and intention of the mandate in Section 955 of Dodd-Frank. Most hedging transactions are already reportable on Form 4 under current SEC rules. Such an expansion would increase the costs associated with the hedging rules without a concomitant benefit to investors. For those companies that permit any form of hedging, it would be necessary to expend additional time and resources monitoring hedging transactions, documenting them and compiling disclosures for inclusion in the proxy statement. In any event, such an expansion is not necessary, due to existing Section 16 reporting requirements, as well as the significant number of companies that already prohibit hedging as discussed above.

Thank you for considering our views. We would be happy to discuss our concerns or any other matters that you believe would be helpful. Please contact Michael J. Ryan, Jr., Vice President at [redacted].

Sincerely,

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

C: The Honorable Mary Jo White, Chair
The Honorable Luis A. Aguilar, Commissioner
The Honorable Daniel M. Gallagher, Commissioner
The Honorable Michael S. Piwowar, Commissioner
The Honorable Kara M. Stein, Commissioner
Mr. Keith F. Higgins, Director, Division of Corporation Finance