Business Roundtable

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September 14, 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 S7-12-15, Rel. Nos. 33-9861; 34-75342; and IC-31702
Proposed Rule 10D-1 for Listing Standards for Recovery of Erroneously Awarded Compensation Pursuant to Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act

This letter is submitted on behalf of Business Roundtable, an association of chief executive officers of leading U.S. companies. With $7.2 trillion in annual revenues and more than 16 million employees worldwide, Business Roundtable companies comprise more than a quarter of the total value of the U.S. stock market.

We appreciate the opportunity to comment on the rule proposed by the U.S. Securities and Exchange Commission (SEC or Commission) pursuant to Section 954 of the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act), as set forth in the Commission's proposing release (Proposed Rule 10D-1 or Proposed Rule).

As a general matter, we believe the Commission goes beyond the Dodd-Frank Act's mandate by proposing an inflexible and unreasonably broad rule. Business Roundtable therefore recommends the Commission adopt a more balanced approach and sets forth the following approaches we believe achieve the purpose of Section 954 in a less costly, burdensome and intrusive manner. In addition, Business Roundtable recommends that the final rule recognize that each situation will have its unique facts and circumstances and appropriate deference should be given in order to allow directors the appropriate exercise of their fiduciary duties to act in the best interests of the corporation and its shareholders.

1. ! Limit the Application of Rule 10D-1 to Instances Where Recoupment is in the Best Interests of the Issuer and its Shareholders.

Proposed Rule 10D-1 goes well beyond the mandate of Section 954 of the Dodd-Frank Act. The proposal's requirement to recover erroneously awarded incentive-based compensation is overly broad and unnecessarily limits exceptions to the clawback requirement to instances when recovery is determined to be "impracticable." Further, impracticability is limited to two situations: 1) when "the direct costs of enforcing recovery" would exceed the amount to be recouped; or 2) recovery would violate preexisting law of the issuer's home country. Finally, the Proposed Rule would only permit use of the impracticability exception after the issuer made a "reasonable" recovery attempt.

As a practical matter, the Proposed Rule's narrow exception and its failure to account for independent director discretion (as described below) coupled with the broad application of Proposed Rule 10D-1 to any executive officer[1] means companies would be required to clawback compensation from employees who had no role, influence, or knowledge relating to the underlying accounting error. This approach is likely to be unduly harsh, particularly for large, international companies with multiple business segments and an extensive number of executive officers.

Although the proposing release acknowledges commentary urging the SEC to respect director discretion, the Commission summarily dismisses this fundamental concern because it "could undermine the purpose of Section 10D."[2] This fails to recognize that directors have fiduciary duties, which would serve to blunt any potential adverse impact to Section 10D. Moreover, the SEC's reading that the Dodd-Frank Act's statement that issuers "will recover" excess incentive-based compensation means board discretion will be prevented in nearly all instances is unnecessarily broad and prescriptive and will result in unjust outcomes and unjustified costs. Board discretion is especially important in light of the broad scope of Proposed Rule 10D-1, which applies to current and former executive officers and includes an unqualified no-fault mandate, the latter of which is not specifically required by Section 954 of the Dodd-Frank Act.

By taking a more balanced approach, the Commission would maintain independent director discretion in a manner that achieves Congress' mandate and best serves the interests of issuers and their shareholders. This includes permitting the independent directors to assess and consider issues such as the likelihood of success, the long-term impact of recoupment, indirect material costs, the circumstances giving rise to the restatement, and the scope of any misconduct or responsibility for the errors giving rise to the accounting restatement. Therefore, Business Roundtable recommends that the final rule require recoupment only when the independent directors, after assessing the relevant facts and circumstances and exercising their fiduciary duties, determine that recoupment is in the best interests of the issuer and its shareholders.

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[1] Defined broadly under the Proposed Rule in a manner similar to the definition of "officer" in Rule 16a-1(f).

[2] 80 Fed. Reg. 41,144 (July 14, 2015), at 41,161.

Finally, the Commission should leave to the discretion of the board whether to disclose the names of current and former executives who have been unable to pay back amounts subject to recoupment. In this regard, Section 954 of the Dodd-Frank Act only requires disclosure of an issuer's clawback policy. The Commission, however, went further by proposing mandated disclosure of the names of current and former executives who have been unable to pay back amounts subject to recoupment. Given the range of potential factors including, for example, security or safety concerns, the likelihood of ongoing confidential legal negotiations, or the potential personal impact of disclosure, the Commission should afford independent directors the discretion to omit individuals' names, consistent with their fiduciary duties, provided the issuer discloses that the independent directors have exercised this discretion.

2. Revisit What Constitutes an "Accounting Restatement" and When it Has Occurred

Rule 10D-1 would define an "accounting restatement" as "the result of the process of revising previously issued financial statements to reflect the correction of one or more errors that are material to those financial statements,"[3] and a restatement due to "material noncompliance" as a "restatement to correct an error that is material to previously issued financial statements."[4] These statements are a step in the right direction, but to help ensure there is no disconnect between the Rule 10D-1 requirements and what is required by applicable accounting requirements, the Commission should revise the Proposed Rule so that it is more explicitly tied to those requirements. Specifically, the Commission should define an "accounting restatement" in the final rule as occurring when the issuer is required by applicable accounting standards to issue restated financial statements to correct one or more errors that are material to previously issued financial statements.

Similarly, Proposed Rule 10D-1 defines the date on which an issuer is required to prepare an accounting restatement as the earlier of: (1) "[t]he date the issuer's board of directors, a committee of the board of directors, or the officer or officers of the issuer authorized to take such action … concludes or reasonably should have concluded, that the issuer's previously issued financial statements contain a material error;" and (2) "[t]he date a court, regulator or other legally authorized body directs the issuer to restate its previously issued financial statements to correct a material error." We believe that the inclusion of any date on which the board "reasonably should have concluded" that the issuer's previously issued financial statements contain a material error introduces an unnecessary element of uncertainty. We also note that Section 954 of the Dodd-Frank Act does not restrict the SEC's ability to interpret the characterization of the date on which an accounting restatement occurs; therefore, the Commission should remove this portion of the characterization. The benefits of this alternative approach would outweigh the complexity and potential confusion that would result from the proposed approach.

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[3] *Id*. at 41,193.
[4] *Id*.

The SEC also requests comment on whether an issuer that evaluates the materiality of certain errors and concludes that such errors are immaterial or are not the result of material noncompliance should be required to disclose its evaluation. It is an enduring tenet of the federal securities laws that disclosure of immaterial information is not required. The proposing release provides no compelling data, information or reasoning that would constitute a basis for making an exception for the circumstances covered by Proposed Rule 10D-1. Indeed, adding this unnecessary requirement would only exacerbate the longstanding concern of disclosure overload.[5]

3. Exempt Certain Awards from the Scope of Rule 10D-1

The Commission should exempt from the final rule the recoupment of equity awards where the executive officer continues to hold either the equity award itself or the number of shares issued under such award (net of any shares sold to pay taxes). As proposed, Rule 10D-1 would require recovery policies to include equity awards that are granted or become vested based wholly or in part on satisfying a financial reporting measure performance goal, including awards based on stock price or total shareholder return (TSR).

Wholesale inclusion of these awards is overly broad. A more reasonable approach would be to permit issuers to carve out from clawback policies equity-based awards that are settled solely in shares, provided that the awards (or any underlying shares) are still held by the executive officer at the time that recoupment is required. This approach would prevent the need to recoup shares that have yet to result in any compensatory benefit and that may be required to be held pursuant to stock ownership guidelines. Indeed, the underlying value of the award or value of the shares will reflect the impact of any accounting restatement. In addition, this approach would avoid the difficult task (even with the use of reasonable estimates) of determining what the stock price or TSR would have been but for the error in the financial statements.

4. Adjust the Effective Date of Rule 10D-1 to Reduce Compliance Costs

The final rule should not apply retrospectively. Rather, it should provide that recovery policies apply only to incentive-based awards granted after the effective date of the relevant exchange listing standards.

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5 *See Basic Inc. v. Levinson*, 485 U.S. 224, 234 (1988) ("[s]ome information is of such dubious significance that insistence on its disclosure may accomplish more harm than good"); "The Importance of Independence," Speech of Chair Mary Jo White at the 14th Annual A.A. Sommer, Jr. Lecture on Corporate, Securities and Financial Law (Oct. 3, 2013), http://www.sec.gov/News/Speech/Detail/Speech/1370539864016#.VEasLvnF98E. ("[w]hen disclosure gets to be too much or strays from its core purposes, it can lead to 'information overload' – a phenomenon in which ever-increasing amounts of disclosure make it difficult for investors to focus on the information that is material and most relevant to their decision-making as investors in our financial markets.").

This approach differs in two respects from Proposed Rule 10D-1, which states that recovery would be required for all excess incentive-based compensation that is granted, earned or vested on or after the effective date of the SEC's final rule. First, the final rule should not apply to existing incentive-based compensation awards (e.g., previously granted awards with ongoing performance periods as of the effective date of listing standards) with a performance period of three years or less. The Commission only cites "the statutory purpose of Section 10D" as justification for applying the final rule to outstanding awards, which fails to justify the costs and burdens that will result from the proposed approach. For example, contrary to the SEC's statement in the proposing release that "issuers can amend […] contracts to accommodate recovery," contracts typically cannot be unilaterally amended.

Second, even if the final rule is not revised as recommended above, the final rule should become effective only upon the effectiveness of the exchange listing standards, not Rule 10D-1. This approach provides issuers with a reasonable transition period without causing significant delay in the application of Rule 10D-1 as the rule would require the exchanges to file proposed rules no later than 90 days, and the listing standards to be effective no later than one year, following publication in the Federal Register of the final version of Rule 10D-1.

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 Michael J. Ryan, Jr. of Business Roundtable, 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
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