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September 15, 2009

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

Dear Ms. Murphy:

RE: *File No. S7-13-09*
Proxy Disclosure and Solicitation Enhancements

This letter is submitted on behalf of Business Roundtable, an association of chief executive officers of leading U.S. companies with more than $5 trillion in annual revenues and nearly ten million employees. Member companies comprise nearly a third of the total value of the U.S. stock markets and represent nearly half of all corporate income taxes paid to the federal government. Annually, they return $133 billion in dividends to shareholders and the economy. Business Roundtable companies give more than $7 billion a year in combined charitable contributions, representing nearly 60% of total corporate giving. They are technology innovation leaders, with $70 billion in annual research and development spending—more than a third of the total private R&D spending in the United States.

Business Roundtable has long been a strong advocate for good corporate governance and supports efforts by the Securities and Exchange Commission (the "Commission" or "SEC") to provide investors with more complete and meaningful disclosure. We generally agree with the thrust of the proposals on proxy disclosure (the "Proposed Rules") set forth in the Commission's proposing release (the "Proposing Release"),[1] although we believe there are certain considerations that should be addressed in connection with the adoption of final rules.

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1 Proxy Disclosure and Solicitation Enhancements, SEC Release No. 33-9052, 34-60280, 74 Fed. Reg. 35,076 (July 17, 2009).

We support the Commission's goal of "provid[ing] investors with important and relevant information upon which to base their proxy voting and investment decisions."[2] However, we share the Commission's concerns about the length and complexity of proxy statements and we echo Chairman Schapiro's statement at the Commission's July 1, 2009 open meeting where she described the Proposed Rules:

> [W]e have stressed the concept of better or more timely disclosure—not simply additional disclosure. I have heard from both investors and companies a shared concern that our proxy statements are in danger of becoming unreadable, because there is so much information packed into them. As commenters consider this proposal, I hope that all will focus on whether the right information is being disclosed in the right way, not just on adding to an already weighty document.[3]

Business Roundtable believes that, as the Commission strives to balance "quality" and "quantity" of disclosure, the focus must be on providing investors with the information that is most important to making informed voting and investment decisions.

Furthermore, as the Commission considers enhancements to the *content* of disclosure provided to investors, it also is important to consider *how* and *where* companies provide this disclosure. Some of the enhanced disclosure in the Proposed Rules, as well as certain existing disclosures, may be more appropriately presented in media other than the proxy statement, such as the annual report on Form 10-K or company websites. In light of the wide availability and use of the Internet, many public companies are using their websites as a communications tool for investors. Thus, shareholders can access a range of information about a company's business and its governance practices quickly and easily on the company's website. In addition, many public companies have used the Commission's new "notice and access" rules to deliver proxy statements to their shareholders electronically. One way for companies to leverage technology and help keep the proxy statement to a manageable length is to allow proxy statements to refer to company websites for more information. Many public companies already have implemented this approach in response to Commission rules and New York Stock Exchange ("NYSE") listing standards that permit and, in some cases require, companies to post corporate governance information on their websites, including documents such as their governance

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2 74 Fed. Reg. at 35,076.

3 SEC Chairman Mary L. Schapiro, Statement at SEC Open Meeting to Propose Proxy Disclosure and Solicitation Enhancements (July 1, 2009), *available at* http://sec.gov/news/speech/2009/spch070109mls.htm.

guidelines, board committee charters and codes of conduct.[4] Moreover, the NYSE recently proposed changes to its listing standards that would give companies the option of making specified corporate governance disclosures on their websites instead of in the proxy statement, as is currently required.[5] Allowing companies to rely on website disclosures would keep proxy statements from growing longer while at the same time assuring that information remains readily available to investors. In our more detailed comments below, we suggest specific ways to implement and expand on this approach to disclosure.

I. Enhanced Corporate Governance Disclosures

A. Director and Nominee Disclosure

The Proposed Rules would amend Item 401 of Regulation S-K to expand the disclosure required about director and nominee experience, qualifications and suitability for service on a company's board and board committees. Business Roundtable believes that information about the backgrounds of board members is important to shareholders in making informed voting and investment decisions. However, we are concerned about mandating disclosure of experience and qualifications on a director-by-director basis. Directors necessarily bring particular skills to the boards where they serve, but they also bring important, more global qualities such as general business experience, judgment, vision, and willingness to ask tough questions and challenge management. In addition, all directors have fiduciary duties of care and loyalty to the companies that they serve, without regard to their particular skill sets or expertise. Finally, nominating/governance committees and boards generally consider directors' qualifications in the broader context of the board's overall composition, with a view toward constituting a board that, as a body, possesses the appropriate skills and experience to oversee the company's business. One unintended effect of calling attention to particular attributes and skills could be an increase in shareholder lawsuits arguing that the specialized knowledge or backgrounds of particular directors should lead to heightened liability. This could discourage qualified individuals from serving on public company boards.

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4 *See* Regulation S-K, Items 407(c)(2)(i), (d)(1) & (e)(2) and Regulation S-K, Instruction 2 to Item 407 (disclosure about "key" committee charters); Regulation S-K, Items 406(c)-(d) and Form 8-K, Item 5.05 (disclosure about codes of conduct, and amendments and waivers to code provisions); NYSE Listed Company Manual §§ 303A.09 & 303A.14 (disclosure about governance guidelines and "key" committee charters).

5 *See* Form 19b-4 of the NYSE, Proposed Amendments to NYSE Listed Company Manual Sections 303A and 307.00, File No. SR-2009-89 (filed with the Commission August 26, 2009).

The text of the Commission's proposed rule on director qualifications specifies that the disclosure should include "information about [a] person's risk assessment skills, particular areas of expertise, or other relevant qualifications" and that, if material, it should cover more than the past five years.[6] Business Roundtable does not believe that it is appropriate for the rule to call out one area of expertise—"risk assessment skills,"—which are just one attribute that a director may possess. Similarly, we do not think that it is necessary for the rule to make specific reference to disclosure going back more than five years. If the Commission does require individualized disclosure about director qualifications, we believe that companies should disclose whatever qualifications the board and/or nominating/governance committee considered relevant and material with respect to each director, without regard to any specific time period.

The proposed changes to Item 401 also would require companies to describe why directors were chosen to serve on the committees where they are members. This disclosure would have to appear in the proxy statement each year for each board committee. Since most boards have at least three and typically more committees, this new disclosure has the potential to lengthen the proxy statement considerably. Yet the Proposing Release is unclear about why this information will "help [investors] in their voting decisions."[7] Moreover, as is the case with considering qualifications for board service, nominating/governance committees and boards generally evaluate directors' qualifications for service on particular committees in the broader context of a committee's overall composition, with a view toward establishing a committee that, as a group, possesses the appropriate skills and experience to oversee the matters that fall within its areas of responsibility. Accordingly, we question whether the proposed disclosure about qualifications for committee service will provide investors with meaningful information. Furthermore, the disclosure may have the effect of discouraging boards from rotating committee members, because boards may have concerns about whether or not investors will perceive directors as qualified for service on particular committees.

The Proposing Release requests comment on whether director qualification disclosure for all of a company's committees would be useful to investors, or if the disclosure should apply only to certain "key" committees.[8] Likewise, the Proposing

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6 74 Fed. Reg. at 35,105.

7 *Id*. at 35,083.

8 *See id*. at 35,084.

Release requests comment on whether the Commission should require companies to list and describe all of their board committees.[9] We suggest that the Commission limit committee disclosure to the audit, compensation and nominating/governance committees. As we state in our *Principles of Corporate Governance* (2005), the functions performed by these committees "are central to effective corporate governance."[10] In addition, these are the committees that the Commission's proxy disclosure rules currently address, that NYSE listing standards require and that most public companies maintain. Public companies have a wide variety of committees beyond those three "key" committees, and we believe that disclosure about qualifications for service on other committees will not provide meaningful information to investors. Moreover, it will be burdensome for companies to identify, and provide disclosure about, director attributes and skills that can readily be linked to committees overseeing areas such as public policy, strategic planning, litigation, and science and technology. We do not believe that it is necessary to require a list and description of all of a company's board committees because companies generally name their standing committees in their corporate governance guidelines, which they post on their websites, and many companies make the charters of these other committees available on their websites as well. As noted below, companies also commonly provide information about their committees and committee membership on a corporate governance section of their websites, and many companies voluntarily disclose this information in the proxy statement.

In its Paperwork Reduction Act analysis, the Commission has estimated only four incremental burden hours for preparing the enhanced director and nominee disclosure.[11] Business Roundtable believes that the Commission has underestimated the amount of time that compliance with the proposed disclosure requirement would entail, and that in practice, it will necessitate many more hours. Companies will need to update their director and officer questionnaires to obtain more detailed information, and director nominees will need to spend additional time responding to these questionnaires and providing companies with information about their backgrounds and qualifications. Once companies have obtained the relevant information, they will need to spend time analyzing it, deciding what information to disclose, and preparing the disclosures. We believe this will require

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9 *See id*.

10 Business Roundtable, *Principles of Corporate Governance* at 16 (November 2005).

11 *See* 74 Fed. Reg. at 35,095.

significantly more than four hours, particularly for companies with larger boards or numerous committees.

Finally, Business Roundtable believes the proposed information about director qualifications and experience would be most useful to shareholders when they are making an initial voting decision with respect to a director nominee. Therefore, and in response to the Commission's request for comment on how frequently it should require director qualification disclosure, we suggest that the Commission revise the Proposed Rules to require the discussion of director qualifications and experience only when nominees are first up for election. If the Commission believes that shareholders should have access to this information for all of a company's directors on an ongoing basis, it could require companies to post the information on their websites and to state in the proxy statement that the information is available there. Many public companies already have a separate page or section of their websites where they post governance information, including director biographies and committee membership information. This approach would be consistent with existing Commission rules permitting companies to post the charters of the three "key" committees on their websites and disclose their website address in lieu of attaching these materials to the proxy statement, as well as NYSE listing standards requiring companies to disclose in their proxy statements that specific governance documents are available on their websites. As noted at the beginning of this letter, this will keep proxy statements from growing considerably longer with the addition of detailed information for directors that are not standing for election for the first time, but this information will still be readily available to investors.

Business Roundtable appreciates the Commission's interest in the issue of board diversity, as we believe that companies are best served by maintaining a diverse board with members of different backgrounds and experiences. In this regard, our *Principles of Corporate Governance* (2005) state that a "diversity of backgrounds and experience, consistent with the corporation's needs . . . is important to the overall composition of the board."[12] In response to the Commission's request for comment,[13] we do not think that additional proxy statement disclosure is needed to address board diversity considerations. Companies typically address diversity considerations, along with other criteria that boards and nominating/governance committees consider important to board membership, in their corporate governance guidelines and often discuss these in the proxy statement.

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12 Business Roundtable, *Principles of Corporate Governance* at 13 (November 2005).

13 *See* 74 Fed. Reg. at 35,084.

The Proposing Release also requests comment on whether the Commission should require disclosure about whether a company's board or a committee periodically conducts an evaluation of the performance of the board, its committees and/or each director.[14] We believe that this disclosure is not necessary. NYSE listing standards require annual evaluations of the board and the three "key" committees. In addition, many companies already address their board's evaluation process in their corporate governance guidelines and in their proxy statements.

B. Disclosure About Board Leadership Structure and the Board's Role in the Risk Management Process

The Proposed Rules would add a new requirement to Item 407 of Regulation S-K requiring disclosure of a company's leadership structure and why the company believes it is the best structure for the company. The specific requirements would include discussion of whether the company combines or separates the roles of chairman and chief executive officer and whether the company has a lead independent director. As we state in our *Principles of Corporate Governance* (2005), Business Roundtable believes that independent board leadership is critical, but that "no one [leadership] structure is right for every corporation."[15] Accordingly, Business Roundtable applauds the Commission for recognizing that "different leadership structures may be suitable for different companies depending on [various] factors,"[16] and for making clear that the "proposed amendments to Item 407 are not intended to influence a company's decision regarding its board leadership structure."[17] However, we believe that it is important to clarify the "leadership structure" to which the Proposed Rules refer. Although it is apparent from the discussion in the Proposing Release that the Proposed Rules would require disclosure about the leadership structure of the board of directors,[18] the Proposed Rules state under the heading "Company leadership structure" that companies must "[b]riefly describe the registrant's leadership structure." The use of the terms "company leadership structure" and "registrant leadership structure" could be interpreted to require a discussion of management leadership structures, which we

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14 *See id*.

15 Business Roundtable, *Principles of Corporate Governance* at 15 (November 2005).

16 74 Fed. Reg. at 35,085.

17 *Id*.

18 *See, e.g.*, *id*. ("Disclosure of board leadership structure . . . will increase the transparency for investors into how boards function.").

do not believe to be the intention of the Proposed Rules. We therefore suggest that the Commission clarify the Proposed Rules to indicate that the disclosure required by Item 407(h) is intended to address board leadership and not management structures.

The Proposed Rules also would require a company to "disclose the extent of the board's role in the [company's] risk management *and the effect that this has on the company's leadership structure*."[19] Although the Proposing Release discusses the subjects of board leadership and risk oversight separately, the proposed rule text combines the two in new Item 407(h) of Regulation S-K and appears to require disclosure about the impact of risk oversight on board leadership. To reflect the Commission's intent—as evidenced by the Proposing Release—to elicit disclosure about risk oversight separate and apart from the issue of board leadership, we recommend addressing these subjects in separate subsections of Item 407. We also recommend adding an instruction to the risk oversight item that includes the examples from the Proposing Release about the types of disclosure companies might provide, including how the board implements and manages its risk management function, whether the persons who oversee risk management report directly to the board as whole or to a committee, and whether and how the board or board committee monitors risk.[20]

The Proposing Release specifically asks for comment on whether the Commission should revise its existing requirements, such as Items 303 and 305 of Regulation S-K, to require additional disclosure about a company's risk management practices in filings such as annual or quarterly reports.[21] We believe that it is appropriate for the Commission to consider this issue, and we suggest that the Commission consider requiring the risk oversight disclosure discussed in the Proposing Release in the Form 10-K rather than the proxy statement. The Form 10-K already requires that a company provide risk factor disclosure about the most significant risks that may adversely affect its business, operations, industry, financial position or future financial performance.[22] Accordingly, we believe that the Form 10-K is the appropriate forum for a description of the board's role in overseeing these risks. We

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19 *Id*. at 35,108 (emphasis added).

20 *Id*.

21 *See id*. at 35,086.

22 *See* Form 10-K, Item 1A.

encourage the Commission to revise the Proposed Rules so that any disclosure relating to board oversight of risk management appears in the Form 10-K.

C. Reporting of Voting Results on Form 8-K

The Proposed Rules would add a new Item 5.07 to Form 8-K to require disclosure of the results of shareholder votes on Form 8-K within four business days after the end of the meeting at which a vote was held. In the case of a contested election of directors where voting results are not definitively determined at the end of the meeting, the Proposed Rules would allow companies to provide preliminary results within four business days after they are determined and to file an amended Form 8-K after certification of the final voting results.

We agree with the Commission that investors and markets would benefit from more timely disclosure of voting results than is required under current rules, and many companies already voluntarily disclose this information on a more timely basis through a press release or other means. Moreover, we concur with the Commission's decision to provide a limited exception for contested elections, since companies may not have definitive voting results within four business days. The Proposing Release asks whether or not commenters believe there are other situations that might warrant a longer filing period.[23] We believe that there are, because there may be other instances—such as director elections involving "vote no" campaigns and shareholder proposals—where the vote is close and final results may not be available for some time. Accordingly, Business Roundtable recommends expanding the proposed exception for contested elections so that it covers any matter for which definitive voting results are not available at the end of the meeting. That way, where the vote on a matter is "too close to call" at a meeting, companies could disclose preliminary voting results within four business days after they become available and file an amended Form 8-K within four business days after certification of the final voting results.

The Proposing Release also requests comment on whether the failure to file a Form 8-K announcing voting results should be deemed a violation of Section 10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") or Rule 10b-5, and what impact, if any, the failure to timely file an 8-K should have on a company's S-3 eligibility.[24] We encourage the Commission to include proposed Item 5.07 on the

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23 74 Fed. Reg. at 35,088.

24 *See id*.

list of items that will not engender 10(b) liability or result in the loss of S-3 eligibility. As noted in the Proposing Release, disclosure of voting results is a matter that historically has been reported in filings that may occur weeks or even months after the vote.[25] We agree with the Commission that matters submitted to a shareholder vote are "important enough to warrant current reporting of the results on Form 8-K."[26] However, we believe that potential Section 10(b) liability and loss of S-3 eligibility are consequences whose severity far exceeds the harm that could flow to shareholders from a failure to file or timely file a Form 8-K announcing voting results.

Finally, we recommend that the Commission consider permitting companies to make the disclosure about voting results on their websites in lieu of filing a Form 8-K. This would be consistent with the approach reflected in Item 5.05 of Form 8-K, which gives companies the option of disclosing amendments and waivers to their codes of conduct on their websites instead of through a Form 8-K.[27] In addition, we believe that website disclosure is appropriate in this circumstance because many companies already use their websites to communicate information about the annual meeting to shareholders.

II. Enhanced Compensation Disclosures

A. Risk Discussion in Compensation Discussion and Analysis

The Proposed Rules would amend Item 402 of Regulation S-K to require companies to discuss and analyze in the Compensation Discussion and Analysis (the "CD&A") their overall compensation policies and practices for employees generally, including non-executive officers, if the risks arising from the incentives created by these policies and practices "may have a material effect" on the company.[28] The Proposing Release provides that disclosure is required only "if the materiality threshold is triggered"[29] and that current rules already require this disclosure for

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25 74 Fed. Reg. at 35,087-88.

26 *Id*. at 35,088.

27 Form 8-K, Item 5.05(c); *see also* Regulation S-K, Item 406(d).

28 74 Fed. Reg. at 35,105-06.

29 *Id*. at 35,078.

named executive officers.[30] We understand the Commission's desire to provide investors with information about risks arising from a company's compensation policies where it is important to their voting decisions. However, we are concerned that uncertainty about what the Proposed Rules would require, and their apparently expansive scope, would make them challenging for companies to comply with and that the resulting disclosures might very well not provide investors with meaningful information.

Under the Proposed Rules, it is unclear when disclosure would be required and, if the compensation committee determines that disclosure is warranted, what companies would have to disclose. The Proposed Rules would require disclosure if "risks arising from the registrant's compensation policies . . . *may* have a material effect on the registrant."[31] At what point do the risks arising from a company's compensation policies rise to this level such that they may have a "material effect" on the company? We also note that "may" is a lower standard than the standard generally used in existing Commission rules, which require disclosure of information that "is material" rather than information that "may be material."[32] Moreover, the Proposed Rules do not address what aspects of compensation policies and practices may trigger disclosure. The Proposed Rules provide examples of the types of situations that could potentially trigger disclosure, but these examples appear to be relevant primarily to financial services companies. Even with the examples, given the emphasis on disclosure varying "depending upon the nature of the registrant's business and the compensation approach,"[33] it is unclear what companies would need to disclose to comply with the new rules. Accordingly, if the Commission moves forward with adoption of a final rule, we request that it provide additional guidance, including more examples of aspects of compensation plans that would trigger disclosure. Otherwise, the resulting uncertainty may cause companies to err on the side of disclosing more information, thereby increasing the length of proxy statements without providing meaningful information to investors.

It also is unclear under the Proposed Rules what procedures a company is to follow in order to produce the proposed disclosure. Compensation committees at many public companies currently are not involved in establishing and administering

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30 *Id*. at 35,078 n.31.

31 *Id*. at 35,105 (emphasis added).

32 *See, e.g.*, Regulation S-K, Items 402(b)(1), (e)(1), (h)(3), (i)(3) & (j)(5).

33 74 Fed. Reg. at 35,106.

compensation policies for non-executive employees. However, it appears that the Proposed Rules would require compensation committees to undertake a risk analysis of compensation policies for all employees.

In addition, the Proposed Rules go well beyond the current scope of the CD&A, which covers named executive officers only, to cover all employees at the company. The Proposed Rules would require companies to assess the risk of all of their compensation programs and policies, regardless of their probability of triggering disclosure, even though it is unlikely that the risks arising from compensation policies for employees who are not highly compensated could have a material effect on the company as a whole. Large, diversified companies may have hundreds of compensation plans and policies, all of which would have to be reviewed under the Proposed Rules. As a result, it would be extremely costly and difficult for companies to comply with the Proposed Rules. We believe that if the Commission moves forward to adopt a final rule, disclosure should be limited to compensation policies and practices covering only executive officers and/or highly-compensated employees. Such an approach would be closer to "strik[ing] the right balance between requiring information that is important to investors, on one hand, and not being unnecessarily burdensome to reporting companies."[34]

The Proposing Release requests comment on whether companies should have to include an affirmative statement in the CD&A that they have "determined that the risks arising from [their] broader compensation policies are not reasonably expected to have a material effect on the company"[35] where they have made this determination. We believe that such a statement should not be required because it would not provide investors with useful information and would create potential liability.

Finally, if the Commission moves forward with a final rule, we ask that it be mindful of timing issues and consider whether a transition period is appropriate. In this regard, calendar-year companies holding annual meetings in April or May generally

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34 SEC Commissioner Kathleen L. Casey, Statement at Open Meeting to Propose Proxy Disclosure and Solicitation Enhancements (July 1, 2009), *available at* http://sec.gov/news/speech/2009/spch070109klc.htm. Commissioner Casey went on to state: "We must be conscious that disclosure obligations that are time-consuming or expensive to produce, or that intrude too far into daily affairs of the company, risk distracting management from the tasks for which they are hired—increasing the value of the companies they run—and thus injuring the very investors we seek to protect."

35 74 Fed. Reg. at 35,079.

must finalize their proxy statements by late February, and compensation committees often begin the process of reviewing the CD&A in early fall of the preceding year. Accordingly, Business Roundtable is concerned that, if a final rule applies for the 2010 proxy season, companies may not have sufficient time to review their compensation policies and practices, make the related materiality assessments and prepare the necessary disclosure.

B. Stock and Option Award Reporting

The Proposed Rules would amend Item 402 of Regulation S-K to require companies to report stock and option awards in the Summary Compensation Table and Director Compensation Table using their aggregate grant-date fair value, as determined in accordance with FAS 123R, rather than using the dollar amount recognized for financial statement reporting purposes for the fiscal year.[36] Generally, we support the Proposed Rules, as they likely will produce disclosure that, in most situations, is more in line with how compensation committees view annual equity compensation—that is, disclosure of the equity compensation that a company grants in a particular year.

The Proposing Release requests comment on whether the Proposed Rules would discourage companies from granting performance-based equity awards because companies would have to disclose the full grant-date fair value of these awards, without regard to the likelihood of achieving the performance targets.[37] We believe that the Proposed Rules would provide such a disincentive, which is counter to the view that awarding performance-based equity awards generally is a best practice in executive compensation.[38]

The Proposed Rules do not specify the basis on which the aggregate grant-date fair value of performance-based equity awards would be disclosed, but state that the aggregate grant-date fair value should be determined in accordance with FAS 123R.[39]

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36 *Id*. at 35,106-07.

37 *Id*. at 35,081-82.

38 *See, e.g.*, Business Roundtable, *Executive Compensation Principles and Commentary* at 6 (January 2007). ("A meaningful portion of executive compensation should be performance based, thereby incorporating a greater element of downside risk into compensation arrangements. This can be accomplished, for example, by linking the granting or vesting of equity compensation to the achievement of meaningful performance targets, including a meaningful vesting period.").

39 74 Fed. Reg. at 35,106-07.

Rather than assuming a specific level of performance (*i.e.*, threshold, target or maximum performance), FAS 123R requires that a company make a determination as to what is the "most probable" scenario and the aggregate grant-date fair value is then determined based on that scenario. Based on a recent interpretation by the staff of the Division of Corporation Finance,[40] we are concerned that some may think that the aggregate grant-date fair value of performance-based equity awards should be reported in the Summary Compensation Table (or Director Compensation Table) on the basis of maximum performance, instead of the "most probable" scenario. Disclosure on the basis of maximum performance would be inconsistent with FAS 123R and tend to overstate compensation.[41] Thus, if a company determines that payout at target performance is the most probable, target performance should be used to determine the aggregate grant-date fair value that would be included in the Summary Compensation Table (or Director Compensation Table) pursuant to FAS 123R.

We recommend that the final rules clearly state that companies should report the aggregate grant-date fair value of these awards on the basis of the most probable scenario as determined by the company for purposes of FAS 123. Investors would still be informed of the maximum potential payout levels of these awards as this information is required in the Grants of Plan-Based Awards Table.

The Proposing Release also requests comment on whether the Summary Compensation Table and Director Compensation Table should report the grant-date fair value of equity awards: (1) granted during the relevant fiscal year ("grant-date-based approach"); or (2) granted for services performed during the relevant fiscal year, even if granted following the end of that year ("service-based approach").[42] We believe that the final rules should adopt (2), a service-based approach, where companies grant awards following year end that relate to services performed during the previous year. We believe that the service-based approach would more accurately reflect the company's compensation decisions for the applicable fiscal year since awards would be disclosed in the year earned without regard to the timing of

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40 *See* Division of Corporation Finance, Regulation S-K Compliance & Disclosure Interpretations, Question 120.05, *available at* http://sec.gov/divisions/corpfin/guidance/regs-kinterp.htm.

41 If the Commission were to require companies to disclose the aggregate grant-date fair value on a basis other than the "most probable" scenario specified under FAS 123R, we believe that target, rather than maximum performance, should be used as the basis for such disclosure as target performance would most accurately reflect compensation committee expectations at the time the award was granted.

42 74 Fed. Reg. at 35,081.

the actual grant. In this regard, because the amount reported for equity awards in the Summary Compensation Table affects the determination of a company's named executive officers (other than the principal executive officer and the principal financial officer),[43] disclosure based on a service-based approach would have the effect of "better align[ing] the identification of named executive officers with company compensation decisions," which is one of the objectives of the Proposed Rules.[44] In addition, the service-based approach would foster consistency between a company's reporting practices and its compensation practices. In addition, a service-based approach would be consistent with the current disclosure rules for reporting salary and cash bonus awards in the Summary Compensation Table for companies where equity grants are made for services performed in the prior year.[45]

Finally, the Proposing Release requests comment on whether the Commission should require companies providing Item 402 disclosure for a fiscal year ending on or after December 15, 2009 to present recomputed disclosure for each preceding fiscal year required to be included in the Summary Compensation Table so that the Stock Awards and Option Awards columns would present the applicable full grant-date fair value.[46] We believe that the final rules should allow, but not require, companies to present recomputed disclosure for the prior fiscal years. Companies could disclose by footnote whether the amounts presented for the prior fiscal years represent the amounts previously disclosed under rules or recomputed amounts under the new rules.

III. Disclosure About Compensation Consultants

The Proposed Rules would require companies to provide disclosure about the services provided by and fees paid to a compensation consultant that plays any role in determining or recommending the amount or form of a company's executive and director compensation if the compensation consultant also provides other services to the company. Business Roundtable supports this proposal because it will provide shareholders with additional information that is relevant to companies' compensation practices and decisions. However, we believe the disclosure could be improved with a few modifications.

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[43] *See* Regulation S-K, Instruction 1 to Item 402(a)(3).

[44] 74 Fed. Reg. at 35,080.

[45] *See* Regulation S-K, Items 402(c)(2)(iii) & (iv).

[46] 74 Fed. Reg. at 35,082.

The Proposed Rules would not require disclosure when the consultant's only role in determining or recommending the amount or form of executive and director compensation is in connection with consulting on broad-based plans that do not discriminate in favor of executive officers or directors (such as 401(k) plans). We believe that the same approach is appropriate for consultants that simply provide the compensation committee with broad-based survey data that is not tied to a particular peer group. As noted in the Proposing Release, the purpose of the enhanced disclosure about compensation consultants is to enable investors to assess any conflicts of interest a compensation consultant may have in determining or recommending executive or director compensation. We believe that when a consultant provides broad-based data to a company's compensation committee, the consultant is merely providing factual information and does not "determine" or "recommend" compensation to the committee. Accordingly, the Proposed Rules should not require disclosure in this situation.

We also believe the amendments should provide a *de minimis* exception for consultants that provide minimal services to the company in addition to their work for the compensation committee. There are instances in which it may be more efficient for a company to retain the compensation committee's consultant to do certain limited work for the company that would not generate the level of fees that are likely to create a conflict of interest. Accordingly, we believe that the Commission should consider limiting disclosure about the other services that a compensation consultant provides to a company, and the fees for those services, to situations where the fees exceed a specified dollar amount. This is analogous to situations where companies must disclose transactions with related persons, but only if the amount involved in a particular transaction exceeds $120,000. We suggest that the Commission consider a similar threshold amount.

IV. Proxy Solicitation Process

The Proposed Rules would permit reliance on the exemption in Exchange Act Rule 14a-2(b)(1) for third parties that furnish unmarked copies of a company's proxy card and communicate their views on matters being voted on. Business Roundtable is concerned that, under the Proposed Rules, these third parties could engage in soliciting activities without companies or other shareholders having the benefit of any public disclosure related to their activities. Unlike under the current regime, parties could solicit without having to file anything with the Commission or provide any notice to the subject company. These changes could lead to a multitude of communications to shareholders without investors or the company being fully informed of important information, including the identity of the person disseminating the materials, the soliciting person's ownership of company securities, or their relationship, if any, with other shareholders or soliciting persons. Investors and companies need to be informed about the soliciting persons' interests (financial or

otherwise), among other things, and to protect investors, these soliciting activities should be subject to Commission scrutiny.

Rather than adopting the Proposed Rule, the Commission should retain the existing requirements pursuant to which third parties that wish to engage in such soliciting activities, including the distribution of copies of the company's proxy card, must publicly file their soliciting materials.[47] In addition, Rule 14a-6(g) should be expanded to require all persons that rely on Rule 14a-2(b)(1), not just those who beneficially own more than $5 million in market value of securities of the class that is the subject of the solicitation, to furnish a Notice of Exempt Solicitation to the Commission pursuant to Rule 14a-103. Requiring this notice would serve the dual purposes of providing the Commission with an opportunity to comment on the soliciting materials and enabling the public to identify the source of information in a "just vote no" campaign, as well as providing notice to the company that the soliciting activities are taking place.

The Commission also has proposed to codify the no-action relief recently granted in *Application of Rule 14a-4(d)(4) to Solicitation for Proposed Minority Slates of Carl Icahn and Eastbourne Capital L.L.C.*[48] by permitting soliciting parties to round out their "short slates" with management's nominees or those of other soliciting persons. We have two concerns with this proposal. First, we believe that by permitting a "mix and match" approach to forming dissident slates of nominees, there is a risk that investors will be confused. Second, there is an even greater risk that different shareholder groups may form stealth 13(d) groups. The Commission has attempted to address this concern in proposed amended Exchange Act Rule 14a-4(d)(4), which would only permit a soliciting person to round out a short slate with both a company's and other persons' nominees so long as the soliciting person: (1) does not form a group with the other persons as determined under Section 13(d)(3) and in Regulation 13D-G; and (2) is not a participant in the other persons' solicitation. We fully support this proposed limitation, as well as the proposed correlating requirement that a person include in its proxy statement representations about the restrictions on forming a group and acting as a participant, since this disclosure would provide transparency to the company and investors concerning the relationships, if any, among several soliciting persons. However, we urge the Commission to go further by

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47 We believe the Commission should not disturb the Second Circuit's decision in *MONY Group, Inc. v. Highfields Capital Management, L.P.*, 368 F.3d 138 (2d Cir. 2004), where the court held that shareholders staging a registration-exempt proxy solicitation could not send duplicates of the company's previously distributed proxy card to shareholders while urging them to vote no, and simultaneously maintain their exemption under Rule 14a-2(b)(1).

48 March 30, 2009.

setting forth the prohibited activities among soliciting persons that would constitute the formation of a group.

V. Other Requests for Comment

The Proposing Release requests comment on other ways in which the Commission could improve proxy disclosures, including disclosures about executive compensation. Among other things, the Proposing Release inquires about the advisability of expanding the executive compensation disclosure requirements to include disclosure of the compensation paid to each executive officer, not just the named executive officers.[49] This would dramatically increase the amount of material required in the CD&A and compensation tables and would result in a significant increase in the cost and length of proxy statements. In addition, investors likely would struggle to thoroughly analyze all of that information on an annual basis in order to be able to make informed voting decisions. Given the concern among investors that proxy statements are becoming unreadable due to the amount of information disclosed in them,[50] we recommend that the Commission not consider this change.

The Proposing Release also requests comment on whether to eliminate the exception to the disclosure requirements that permits companies to omit performance targets if disclosing them would cause competitive harm.[51] We do not believe this change would be in investors' best interests for several reasons. First, if companies choose to continue to use these performance targets, but have to disclose them, their competitors would have a competitive advantage because these targets would be disclosed in the proxy statement. Second, and more likely, companies would be discouraged from using these types of performance targets and may alter the design of their incentive compensation programs by switching to other financial metrics or completely subjective performance targets. If the company had determined that the original performance targets were best suited to incentivize the named executive officers to maximize shareholder value, then this change would not be in investors' best interests.

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49 74 Fed. Reg. at 35,092.

50 *See* SEC Chairman Mary L. Schapiro, Statement at Open Meeting to Propose Proxy Disclosure and Solicitation Enhancements (July 1, 2009), *available at* http://sec.gov/news/speech/2009/spch070109mls.htm (stressing the need for better disclosure "not simply additional disclosure" because of a "concern that our proxy statements are in danger of becoming unreadable, because there is so much information packed into them").

51 74 Fed. Reg. at 35,092.

In addition, the Proposing Release requests comment on whether to require disclosure about: (1) hold-to-retirement and clawback provisions; (2) internal pay ratios, including disclosure of the ratio of total compensation of the named executive officers, or total compensation of each individual named executive officer, to the total compensation of the average non-executive employee of the company; and (3) the total number of compensation plans a company has in place and the total number of variables in these plans.[52] We note that clawback provisions already appear among the list of suggested items to address in the CD&A.[53] For the other items, we do not believe that specific requirements are necessary because if these items are a material factor underlying compensation decisions, companies already should address them in the CD&A.[54] Finally, we do not believe that data about the number of compensation plans, and the variables in those plans, would be meaningful to investors.

In conclusion, we share Chairman Schapiro's concerns about the length and readability of proxy statements, and we believe that the increased length of executive compensation disclosures in proxy statements is the leading cause of these concerns. During this past proxy season, we have observed executive compensation disclosures in excess of 50 pages (including the CD&A, and tabular and narrative disclosures). Business Roundtable believes that one possibility the Commission should explore is permitting companies to move some of the executive compensation tables that do not directly relate to decisions made about the most recent fiscal year to their websites. This would streamline the compensation disclosures in the proxy statement, making them more understandable for average investors while maintaining the transparency of the more detailed information.

The specific tables that we believe companies could move to their websites include the Outstanding Equity Awards at Fiscal Year-End Table, the Option Exercises and Stock Vested Table, the Pension Benefits Table, and the Non-Qualified Deferred Compensation Table (along with the narrative disclosures that accompany those tables). Allowing companies to move these tables and related narrative disclosures to their websites would reduce considerably the length of proxy statements (for some companies the Pension Benefits Table and narrative alone is eight or nine pages). As noted at the beginning of this letter, the Commission and NYSE already permit, and in some cases require, disclosure of certain information on company websites rather than in Commission filings, and we believe that

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52 *Id*. at 35,092-93.

53 *See* Regulation S-K, Item 402(b)(2)(viii).

54 *See id*., at Item 402(b)(1).

the Commission should explore the expansion of this approach to the area of executive compensation disclosures.

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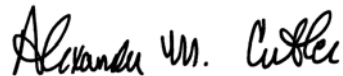
Thank you for considering our comments. We would be happy to discuss our concerns or any other matters that you believe would be helpful. Please contact Larry Burton, Executive Director of Business Roundtable, at (202) 872-1260.

Sincerely,



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c: The Honorable Mary L. Schapiro, Chairman
The Honorable Kathleen L. Casey, Commissioner
The Honorable Elisse B. Walter, Commissioner
The Honorable Luis A. Aguilar, Commissioner
The Honorable Troy A. Paredes, Commissioner
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