



## Business Roundtable

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### **BY EMAIL**

April 10, 2006

Ms. Nancy M. Morris  
Secretary  
U.S. Securities and Exchange Commission  
100 F St., NE  
Washington, DC 20549-9303

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Chairman

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**Re: File No. S7-03-06, Release No. 33-8655, 34-53185  
Executive Compensation and Related Party Disclosure**

Dear Ms. Morris:

This letter is submitted on behalf of Business Roundtable ([www.businessroundtable.org](http://www.businessroundtable.org)), an association of chief executive officers of leading U.S. companies with over \$4.5 trillion in annual revenues and more than 10 million employees. Member companies comprise nearly a third of the total value of the U.S. stock market and represent nearly a third of all corporate income taxes paid to the federal government. Collectively, they returned more than \$98 billion in dividends to shareholders and the economy in 2004. Roundtable companies give more than \$7 billion a year in combined charitable contributions, representing nearly 60 percent of total corporate giving. They are technology innovation leaders, with \$86 billion in annual research and development spending – nearly half of the total private R&D spending in the U.S.

The Roundtable supports the Securities and Exchange Commission's efforts to "provide investors with a clearer and more complete picture of compensation to principal executive officers, principal financial officers, the other highest paid executive officers and directors." In this regard, the Roundtable has issued *Principles of Corporate Governance* (2005) and *Executive Compensation: Principles and Commentary* (2003), both of which endorse providing shareholders with meaningful and understandable information about a company's executive compensation practices. We appreciate the opportunity to provide our views on the Commission's proposed amendments to the disclosure requirements for executive and director compensation, related party transactions, director independence, and other corporate governance matters and disclosure requirements (the "Proposed Rules"). As discussed in more detail below, we believe that there are some aspects of the Proposed Rules that can be improved including, among other things, eliminating the proposed disclosure requirement concerning non-executive officers and revising the proposed disclosure requirements concerning total compensation, deferred compensation, retirement and change in control and corporate governance.

## **I. Compensation Disclosure & Analysis**

The Roundtable supports the Commission's efforts to enhance disclosures about the material elements of companies' compensation objectives and policies for their named executive officers ("NEOs"). In the past few years, many compensation committees have sought to provide more meaningful disclosures in their compensation committee reports. The Commission's emphasis on, and the additional detail proposed for, the Compensation Disclosure & Analysis will further this process.

We believe, however, that such disclosure should continue to be included in a report of a company's compensation committee. A company's compensation committee is legally responsible for decisions regarding the compensation of its NEOs. In this regard, securities market listing standards, state law and compensation committee charters generally provide that it is the compensation committee or the independent directors who review CEO performance, determine CEO compensation, and make recommendations to the board about non-CEO compensation and other compensation plans.

Moreover, the disclosures to be provided in the proposed Compensation Disclosure and Analysis (e.g., how determinations are made as to when equity awards are granted and factors considered in decisions to increase or decrease compensation materially) are particularly within the knowledge of compensation committee members, not company management. Similarly, the certifications set forth in Sections 302 and 906 of the Sarbanes-Oxley Act of 2002, required by chief executive officers and chief financial officers with respect to periodic reports, should not cover these narrative disclosures. CEOs and CFOs are not in a position to certify the processes and methodologies employed by the compensation committee in setting their own compensation. It is the compensation committee – not the CEO or CFO – who can best provide the disclosures set forth in the Proposed Rules (e.g., "why does the company choose to pay each element," and "how does the company determine the amounts [(and, where applicable, the formula)] for each element."). Thus, we believe that the narrative disclosures regarding the compensation objectives and policies for NEOs should continue to be provided over the names of the members of the compensation committee and should not be covered by the certifications required by Sections 302 and 906 of Sarbanes-Oxley. Consequently, we believe that these disclosures should continue to be "furnished" rather than "filed" with the Commission.

## **II. Compensation Disclosures for Up to Three Non-Executive Officers**

The requirement in the Proposed Rules to disclose the total compensation and job description of up to three employees who are not executive officers and whose compensation exceeded any NEO's total compensation will not provide useful information to investors in making voting and investment decisions and raises a number of concerns. First, since it is highly unlikely that the compensation committee is the decision-maker with respect to non-executive employees' compensation, it is unclear as to what purpose this information is intended to serve. Second, disclosing the compensation of certain non-executive officer employees may cause companies competitive harm by assisting competitors in targeting recruiting efforts at companies' top performers. Moreover, disclosure of non-executive employee compensation may lead valued employees to seek new positions at non-U.S. firms and hedge funds in order to protect their privacy and avoid public disclosure of their compensation. Third,

the type of employees that may need to be reported under this disclosure will vary greatly by industry (e.g., sales personnel, investment bankers, entertainers, etc.), making it less likely that the information will be readily comparable. Finally, whereas NEOs' total compensation is typically uniform with respect to individual compensation elements and proxy disclosure, non-executives' compensation elements may be wholly different, provide no relative basis of comparison and, without context, would only cause employee morale issues and controversy within a company.

For these reasons, we believe that the disclosure of non-executive officer employee compensation information is unnecessary to the Commission's goal of providing investors with a clearer and more complete picture of the compensation earned by a company's senior management and of the compensation decisions of the company's compensation committee. Therefore, we urge the Commission to not adopt this aspect of the Proposed Rules.

### **III. Summary Compensation Table**

The Roundtable understands the Commission's desire to provide investors with quantifiable information regarding aggregate compensation paid to NEOs. However, we believe that, given the complexity of executive compensation, it is preferable to divide the Total Compensation Column into two separate columns to distinguish between compensation in a particular year that is *actually received* by NEOs and that which NEOs have been given the *opportunity to earn* at some point in the future. An example of our suggested approach is set forth in Exhibit A to this letter. This two column approach responds to concerns that the proposed Total Compensation Column requires companies to combine amounts paid and amounts that at best may be paid at different points of time far in the future, or at worst may never be paid because performance or other criteria are not met. Thus, we believe that this two column format will provide shareholders with a better and more accurate understanding of NEOs' total compensation distinguishing compensation actually paid in a given year and that which only has the potential to be paid in the future, but that may never actually be realized.

### **IV. Identification of the Most Highly Compensated Officers**

Under the Proposed Rules, companies will determine their three most highly compensated executive officers based on the amount disclosed in the Total Compensation Column rather than the aggregate of the Salary and Bonus columns as required under the current rules. We believe that the current approach is preferable, as the use of total compensation will result in factors unrelated to annual compensation governing the executive officers whose compensation is disclosed. For example, under the Proposed Rules, an executive who has been with the company for many years and accrued a substantial nonqualified deferred compensation account may be included as an NEO even though this executive's salary and bonus are much lower than that of other executives with more significant responsibilities.

We also believe that determining NEO status based on the proposed Total Compensation Column could lead to significant year-over-year volatility in a company's NEOs. A single payment in a given year could alter the individuals who must be disclosed in the Summary Compensation Table. This could prevent shareholders from receiving timely information on the specific compensation paid to the most important executive officers. The existing rules already allow companies discretion to exclude a

highly compensated individual who is not the CEO due to unusually large bonus amounts or other amounts that are not part of a recurring arrangement (Reg. S-K, Instructions to Item 402(a)(3)). That discretion should continue.

## **V. Deferred Compensation Disclosures**

### *A. All Other Compensation: Earnings on Deferred Compensation*

The Proposed Rules require inclusion in the Summary Compensation Table of “[a]ll earnings on compensation that is deferred on a basis that is not tax-qualified.” This is in contrast to the Commission’s current rules requiring disclosure of earnings on these amounts only to the extent that earnings are “[a]bove-market or preferential,” which we believe is the appropriate standard.

Market rate earnings on deferred compensation amounts are not compensation. They reflect an NEO’s decision to defer his or her compensation, which is already reported in the year it is earned. This amount could otherwise be invested and receive a market rate return. The proposed disclosure also may discourage NEOs from electing to defer compensation. For these reasons, the Commission should continue to require the disclosure only of “[a]bove-market or preferential” earnings on deferred compensation. To the extent that the Commission may be concerned about the way in which the current standard is being applied, that concern can be addressed by codifying existing staff interpretations regarding what is “above-market” rather than requiring disclosure of market rate earnings.

### *B. Nonqualified Defined Contribution and Other Deferred Compensation Plans Table*

The proposing release indicates that, in an effort to “provide a more complete picture of potential post-employment compensation,” the Commission is proposing to require disclosure of a Nonqualified Defined Contribution and Other Deferred Compensation Plans Table (“Deferred Compensation Table”). This Table will require additional (and at times repetitive) disclosure of compensation paid and earnings on such compensation. The Roundtable believes that this additional disclosure should not be required because it will result in “double counting” of amounts previously disclosed and because such amounts do not reflect compensation actually paid to a company’s NEOs.

“Double counting” will occur because deferred amounts are included in the Summary Compensation Table in the year such compensation is received and deferred, and will be included again in the proposed Deferred Compensation Table. Our concern is not alleviated by the provision in the Proposed Rules that companies should disclose in a footnote to the Deferred Compensation Table amounts that previously have been reported as compensation.

Moreover, amounts disclosed in the Deferred Compensation Table are not annual compensation but instead amounts that an NEO has elected to defer, often due to individual tax planning considerations. These amounts represent an investment that the NEO has made in the company, not compensation. Thus, the aggregate balance and earnings thereon have no correlation to an NEO’s annual compensation. Instead, an NEO’s balance under a deferred compensation plan is the equivalent of a bank

account where the NEO has deposited certain amounts. However, unlike deposits with federally insured banks, these amounts are “at risk” – dependent on the company’s future, just as shareholders are with respect to their shares – since these are unfunded liabilities on a company’s balance sheet. Disclosure of these balances could deter such deferrals, thereby undermining an important method for linking NEOs’ and shareholders’ interests.

## **VI. Retirement Plan and Change in Control Disclosures**

### *A. All Other Compensation: Increase in Pension Value*

The Roundtable does not believe that the Commission should require disclosure of “[t]he annual increase in actuarial value of [tax-qualified defined benefit and supplemental employee retirement] plans. ”Actuarial values are heavily impacted by factors other than compensation, including an NEO’s tenure with the company and an NEO’s age. Moreover, the determination of actuarial values requires assumptions to be made concerning a variety of factors. Two identical pension plans could be determined to have significantly different values depending on the particular assumptions made in attempting to calculate the value of each. The resulting disclosure will not be meaningful to investors nor result in disclosures that can be readily compared between companies. Moreover, pension plans typically are offset by a company’s tax-qualified plans, an NEO’s Social Security benefits and similar plans made available through an NEO’s prior employer.

If the Commission nevertheless determines to require disclosure of increases in actuarial values, we suggest that such information be included in the Retirement Plan Potential Annual Payments and Benefits Table (“Retirement Table”) instead of the Summary Compensation Table. The increase in pension value is similar to the types of information to be disclosed in the Retirement Table and is wholly unrelated to the types of compensation information required to be set forth in the Summary Compensation Table.

### *B. Retirement Plan Potential Annual Payments and Benefits Table and Change in Control Disclosures*

The Roundtable supports the Commission’s efforts to provide additional disclosure regarding specific pension benefits available to NEOs. However, we believe that the Proposed Rules are unnecessarily detailed with respect to the information required to be included in the Retirement Table. We are concerned that the Proposed Rules will result in excessive, highly detailed disclosure that, because of the multitude of assumptions involved, will be nearly impossible for companies to compile and for investors to understand. Moreover, because retirement plans vary greatly, we do not believe that these disclosures will be readily comparable, thus reducing their utility to investors. We believe that any requirements in this regard should instead be principles-based.

Similarly, we are concerned that proposed Item 402(k), which will expand disclosure requirements regarding termination and change in control provisions, will result in voluminous disclosure based on hypothetical estimates of change in control payments. In this regard, it may be impossible to accurately estimate many of these payments and requiring their disclosure may well increase liability. We therefore encourage the

Commission to revise Item 402(k) to remove the requirement that companies disclose “the estimate[d] payments and benefits that would be provided in each termination circumstance.”

## **VII. Related Party Transactions**

We appreciate the Commission’s efforts to update and simplify the related party transaction disclosure requirements under Item 404 of Regulation S-K. In particular, we support increasing the Item 404 disclosure threshold from \$60,000 to \$120,000. However, with respect to the proposal to require disclosure of a company’s policies and procedures regarding related party transactions, we note that many companies already include these policies and procedures in their codes of conduct. Accordingly, we encourage the Commission to permit companies to cross-reference to such information on a company’s website rather than requiring duplicative disclosure in a company’s proxy statement. Section 303A.10 of the New York Stock Exchange (NYSE) Listed Company Manual requires listed companies to adopt codes of conduct and publicize the codes by posting them on their corporate websites. Thus, we encourage the Commission to conform its proposed disclosure requirements accordingly.

## **VIII. Corporate Governance Disclosures**

We commend the Commission for proposing to consolidate and update the myriad of corporate governance disclosure requirements into proposed Item 407 of Regulation S-K. However, we have some concerns with respect to proposed Item 407(a)(3), which would require disclosure of “any transactions, relationships or arrangements not disclosed [under Item 404(a)] that were considered by the board of directors of the company in determining that the applicable independence standards were met” (*emphasis added*). As discussed in more detail below, such disclosure is overly broad and unnecessary.

Several current requirements contain, or permit companies to adopt, thresholds whereby certain relationships are not required to be disclosed. For example, current Item 404(b) of Regulation S-K requires disclosure of, among other things, certain business relationships where the amount involved is “in excess of five percent of (i) the registrant’s consolidated gross revenues for its last full fiscal year, or (ii) the other entity’s consolidated gross revenues for its last full fiscal year.” Similarly, under Section 303A of the NYSE’s Listed Company Manual, a company may adopt categorical independence standards delineating those relationships and transactions that the company has determined are *per se* immaterial with respect to director independence. Relationships and transactions that fall within those standards are not required to be disclosed. Companies must publicly disclose these categorical standards and thus investors are aware of the criteria applied by boards of directors in determining a director’s independence. If a relationship does not fall within these standards, and the director is nevertheless determined to be independent, companies must disclose the relationship and the basis for such determination.

Proposed Item 407(a)(3) does not contain any such threshold and instead requires disclosure of every “transaction, relationship or arrangement” not already disclosed but considered by a board. Boards of directors take seriously their responsibility to examine the various relationships that directors may have with other business and non-profit organizations and management. As a result, we believe that the Proposed Rules

could result in extensive disclosures that are less useful to investors than the current disclosures regarding categorical independence standards. As noted in the Commentary to NYSE Listed Company Manual Section 303A.02(a), the approach with respect to categorical standards described above “provides investors with an adequate means of assessing the quality of a board’s independence and its independence determinations while avoiding excessive disclosure of immaterial relationships.”

The Proposed Rules may also make it more difficult to recruit independent directors since companies will need to disclose mere coincidental relationships that do not impact a determination that a candidate is independent. Moreover, since the NYSE independence standards were adopted in 2003, we believe that investors have become accustomed to these disclosures about company categorical standards and independence determinations that fall outside of those standards. For these reasons, we believe that the Commission should revise Item 407(a)(3) to incorporate the categorical standards concept in Section 303A of the NYSE Listed Company Manual or the five percent threshold in current Item 404(b) so that immaterial transactions need not be disclosed.

We also are concerned that some of the required disclosures in proposed Item 407(e) concerning the compensation committee are not useful to investors and reflect a misunderstanding of the process followed by compensation committees in considering executive compensation. Specifically, the Proposed Rules will require disclosure of “any role of executive officers in determining or recommending the amount or form of executive and director compensation. ”Company executive officers often provide information to the compensation committee that is necessary for the committee’s decision making. For example, chief executive officers share their views on the individual performance of other executive officers, chief financial officers share financial information relevant to benchmarking performance and related compensation, the head of human resources may provide feedback on the company’s compensation programs, and the general counsel may provide analysis with respect to the provisions of various equity-based plans. For these reasons, we urge the Commission to narrow the scope of proposed Item 407(e) so that it does not require disclosure of information sharing activities that are part of the ordinary procedures of information gathering used by compensation committees in considering executive officers’ compensation.

## **IX. Other Issues**

The Proposed Rules will significantly expand disclosures regarding severance and “change of control” payments. Pending before the Commission is a proposed rule to establish new NASD Rule 2290 (Amendment No. 3 to SR-NASD-2005-080, “Proposed Rule Change to Establish New NASD Rule 2290 Regarding Fairness Opinions”). This NASD proposal will require fairness opinions issued by NASD members to address whether executive compensation arising from the underlying transaction is a factor in reaching a fairness determination. Some NASD members have objected to the NASD proposal because they do not have the requisite expertise or experience with executive compensation arrangements generally to provide such analysis. We believe that the enhanced disclosures set forth in the Proposed Rules provides investors with necessary information about severance and change of control payments, thereby eliminating the need for the NASD proposal to address such issues.

April 10, 2006

Page 8 of 8

Business Roundtable appreciates the opportunity to provide comments on the Proposed Rules. Please do not hesitate to contact Thomas Lehner at Business Roundtable at (202) 872-1260 if we can provide further information.

Sincerely,

/s/ Steve Odland

Steve Odland  
Chairman and CEO, Office Depot, Inc.  
Chairman, Corporate Governance Task Force  
Business Roundtable

Attachment

cc: Hon. Christopher Cox, Chairman, U.S. Securities and Exchange Commission  
Hon. Paul S. Atkins, Commissioner  
Hon. Roel C. Campos, Commissioner  
Hon. Cynthia A. Glassman, Commissioner  
Hon. Annette L. Nazareth, Commissioner  
John W. White, Director, Division of Corporation Finance  
Brian G. Cartwright, General Counsel



**EXHIBIT A**

**REVISED SUMMARY COMPENSATION TABLE**

								<b><u>Total Compensation</u></b>	
<b><u>Name and Principal Position</u></b> (a)	<b><u>Year</u></b> (b)	<b><u>Salary (\$)</u></b> (c)	<b><u>Bonus (\$)</u></b> (d)	<b><u>Stock Awards (\$)</u></b> (e)	<b><u>Option Awards (\$)</u></b> (f)	<b><u>Non-Stock Incentive Plan Compensation (\$)</u></b> (g)	<b><u>All Other Compensation (\$)</u></b> (h)	<b><u>Actually Received* (\$)</u></b> (i)	<b><u>Opportunity to Earn** (\$)</u></b> (j)
Principal Executive Officer	____ ____ ____								
Principal Financial Officer	____ ____ ____								
A	____ ____ ____								
B	____ ____ ____								
C	____ ____ ____								

\* The Actually Received column, based on the Proposed Rules, generally would include the amounts in the columns titled Salary, Bonus, Non-Stock Incentive Plan Compensation and All Other Compensation.

\*\* The Opportunity to Earn column, based on the Proposed Rules, generally would include Stock Awards and Option Awards.