

June 12, 2018

SEC Commissioner Questions Insider Sales into Stock Buybacks

SEC Commissioner Robert J. Jackson, Jr. has [called](#) for the Commission to review its rules regarding share repurchases in order to limit corporate insiders from selling shares granted to them as part of performance-related equity grants following a corporate buyback announcement, and address other related topics:

The increasingly rapid cycling of capital at American public companies has had real costs for American workers and families. We need our corporations to create the kind of long-term, sustainable value that leads to the stable jobs American families count on to build their futures. Corporate boards and executives should be working on those investments, not cashing in on short-term financial engineering.

In his speech, Commissioner Jackson also suggested that board compensation committees should have oversight with respect to insider trades linked to buybacks.

With respect to encouraging an SEC-initiated “open comment period” regarding buyback rules, Commissioner Jackson suggests the following topics, at a minimum, be addressed:

- restructuring existing safe harbors from liability to “disfavor the use of buybacks for insider sales” and avoid “encourag[ing] corporate executives to use buybacks to sell their shares”;
- “circumstances where managers who founded the firm or are otherwise large shareholders seek liquidity for those holdings using buybacks”; and
- “other problems with Rule 10b-18 and related rules—including the fact that they require only quarterly disclosure of the amount of shares a company has actually repurchased, leaving investors largely in the dark about corporate trading in their own shares.”

With respect to compensation committees, Commissioner Jackson suggests:

....the company’s compensation committee should be required to carefully review the degree to which the buyback will be used as a chance for executives to turn long-term performance incentives into cash. If executives will use the buyback to cash out, the committee should be required to approve that decision and disclose to investors the reasons why it is in the company’s long-term interests. It is hard to see why a company’s buyback announcement shouldn’t be accompanied by this kind of disclosure.

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This would be a novel charge for compensation committees; currently, promoting alignment through equity ownership is addressed through pay for performance policies, compensation program design and company-specific equity ownership guidelines. Historically, trading activity by directors and officers is governed by robust company-specific securities trading policies and protocols, including the selective use of 10b5-1 trading plans, alongside SEC rules and securities laws.

While Commissioner Jackson's suggestions do not, at this time, reflect a majority view and it is, at best, debatable whether buybacks are in fact used to enable stock sales by directors and officers, his remarks underscore heightened interest in how U.S. public companies are allocating capital, including use of tax reform proceeds and balancing returning capital to shareholders with investing in business opportunities.

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