

# United States Senate

WASHINGTON, DC 20510

November 29, 2017

Mr. Robert J. Jackson Jr.  
Jerome Greene Hall  
Room 819  
435 West 116<sup>th</sup> Street  
New York, NY 10027

Dear Mr. Jackson:

In advance of a vote in the Senate to confirm your nomination as Commissioner of the Securities and Exchange Commission (SEC), I would like to ask for your views on several matters before the Commission.

Over the last few decades, the influence of our financial markets on the economy has grown substantially. Where once markets supplied workers' hard-earned savings to companies that needed money to invest, today our markets are primarily used to distribute cash to shareholders. Ever more aggressive investors demand share buybacks and their allies in executive suites—their compensation increasingly dependent on stock price—are all too happy to oblige.

The SEC has presided over this 'financialization' of our economy, which has facilitated the looting of the American corporation by short-term shareholders. Taxpayers—who invest in the public education, government regulation, and infrastructure needed for corporations to thrive, and workers—who contribute their time and efforts to build innovative companies, are often viewed as obstacles that must be overcome in order to maximize payouts to shareholders.

Wall Street's aggressive pursuit of short-term profits at the expense of long-term growth and jobs demands a response. I have pushed the Commission to study buybacks, introduced legislation to curb the abuses of activist hedge funds, and called for stricter rules on executive compensation. Yet, while it has broad authority from Congress to rein in abuses, the SEC has been hesitant to do so.

As a nominee to serve as an SEC Commissioner, it is important that the public know where you stand on these critical issues before the Senate votes on your nomination. I request a written response to the questions listed below before I will agree to a unanimous consent request to hold a vote on your confirmation.

## **Activist Hedge Funds and the Brokaw Act**

I have introduced legislation, the Brokaw Act (S. 1744), to reform SEC rules that dictate which investors must disclose their stakes in a company's stock, and how quickly they must do so. Current law requires an investor (or group of investors) that has secured five percent of the total of an issuer's outstanding securities to file a Schedule 13(d) form within 10 days. This filing is intended to notify the marketplace and the issuer of the investor's stake and the potential implications of the stock acquisition on the company.

The SEC has the authority to make many of the changes sought in the Brokaw Act without congressional action. The Commission may shorten the 10-day window, require disclosure of derivative positions, and more strictly enforce the 'person or group' definition that could require groups of investors to count their collective holdings towards the five percent threshold. However, SEC has not taken action on these issues.

The Brokaw Act is aimed at curbing the short-term influence of activist hedge funds, which have abused the 13(d) disclosure rules to covertly gain stakes in public companies. As a Commissioner, your opinion may dictate the future of these rules, which is why I am seeking answers to the following questions:

1. In 2011, you co-authored a paper, 'The Law and Economics of Blockholder Disclosure.'<sup>1</sup> In that paper, you argue that shortening the 13(d) 10-day window would discourage active shareholders from buying large blocks of stock and "investing in monitoring and disciplining management" of the stock issuing company. The paper argues that fewer actively participating large blockholders would harm public investors who share in the value created by actions of the large blockholder. Do you still hold this view?
2. In the 2011 paper, you wrote that "There is a substantial body of empirical evidence that is consistent with the view that outside blockholders improve corporate governance and benefit public investors." Do you still believe that the current body of empirical evidence makes this conclusion clear?
3. I am concerned that the influence of aggressive short-term oriented shareholders, along with the rise of stock-based pay, have made corporate executives focus myopically on their share price at the expense of long-term growth and serving other stakeholders such as workers and taxpayers. Do you believe large blockholders contribute to this problem, and if so, how would you combat it?
4. Do you believe activist hedge funds encourage public companies to cut their investments in favor of buying back their own stock?
5. Do you believe the definition of 'person or group' should be updated to capture groups of investors coordinating their actions to remain under the five percent threshold?
6. What do you believe is the purpose of the 10-day 13(d) disclosure window?
7. Do you believe the current 13(d) disclosure rules adequately provide issuers, investors, and the marketplace with sufficient information about large shareholders?
8. If investors are found to be intentionally skirting the 13(d) disclosure rules (for example, by forming a 'wolf pack' or using a derivative to avoid filing a 13D) do you support updating the SEC's rules to restore the spirit of the law?

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<sup>1</sup> [Bebchuk & Jackson. 'Law and Economics of Blockholder Disclosure'. \*Harvard Business Law Review\*. July 2011.](#)

## Stock Buybacks

I have sent two letters<sup>2,3</sup> and a submitted a public comment<sup>4</sup> to the Commission outlining my concerns with the disturbing amount of money public corporations are spending buying back their own stock. American corporations have spent \$7 trillion on stock buybacks since 2003. These repurchases have enriched executives, many of whom receive pay in the form of stock, which helps explain why now many CEOs make 300 to 500 times more than their median employees. Buybacks reward short-term oriented activist hedge funds and executives at the expense of workers and investors saving for retirement. I am disappointed that the Commission has done nothing to address—or even study—this phenomenon. I have the following questions about your views on stock buybacks.

1. The SEC's mission is to facilitate capital formation. However, in recent decades, through stock repurchases and mergers, public corporations actually send money to the stock market, rather than vice versa. Over the last decade, *net* equity issuances (stock issuances minus buybacks) averaged negative \$412 *billion* per year (money flowing out of companies to shareholders).<sup>5</sup> Are you at all concerned about the rate of buybacks and, what, if anything, do you believe the SEC should do to reverse the extraction phenomenon in our public markets?
2. Stock buybacks have famously increased in frequency since the 1982 10b-18 rule that provides safe harbor from insider trading charges to executives buying back their company's stock.<sup>6</sup> Do you believe that 10b-18 should be reconsidered in light of the explosion of stock buybacks?
3. Buybacks have been observed to coincide with declines in R&D spending, and possible investment overall.<sup>7</sup> Are you concerned that the amount of corporate capital flowing to stock buybacks could undermine American global competitiveness?
4. What impact do you believe increased stock buybacks have had on wages and jobs?
5. Do you support requiring public companies to disclose their repurchases and issuances more frequently, and include more granular data about the transactions?

## Executive Pay Rules

As you know, Dodd-Frank requires the Commission, along with other regulators, to propose compensation rules intended to curb excessive risk taking at financial institutions. Compensation schemes that incentivized excessive risk-taking were a key cause of the financial crisis, according to the Financial Crisis Inquiry Report<sup>8</sup>. While executives and financial institutions would prefer that we forget this, American families, who collectively lost over 8 million jobs and \$19 trillion in household wealth as a result of the crisis, demand that we remember. I have called<sup>9</sup> on the Commission and other

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<sup>2</sup> [Baldwin, Tammy. "To Chair Mary Jo White". 23 Apr 2015.](#)

<sup>3</sup> [Baldwin, Tammy. "To Chair Mary Jo White". 16 Nov 2015.](#)

<sup>4</sup> [Baldwin, Tammy. "Re: Business and Financial Disclosure Required by Regulation S-K; Concept Release \(RIN 3235-AL78\)". 8 Aug 2016.](#)

<sup>5</sup> [Lazonick, William. "The Functions of the Stock Market and the Fallacies of Shareholder Value". University of Massachusetts Lowell and the Academic-Industry Research Network. 5 Jun 2017.](#)

<sup>6</sup> [Lazonick, William. "Profits Without Prosperity". Harvard Business Review. Sep 2014.](#)

<sup>7</sup> [J.W. Mason, "Disgorge the Cash: The Disconnect Between Corporate Borrowing and Investment". \(The Roosevelt Institute 2015\)](#)

<sup>8</sup> [Financial Crisis Inquiry Commission. 'The Financial Crisis Inquiry Report'. Government Printing Office. Jan 2011](#)

<sup>9</sup> [Baldwin, Tammy. "Re: Timeline for issuing Sec. 956 final rule". 30 Apr 2015.](#)

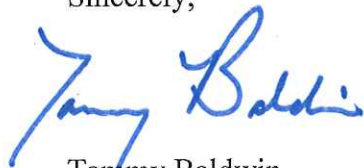
regulators to finish the executive pay rules, included in Sections 954 and 956 of Dodd-Frank. I am disappointed that new leadership at the Commission has seen fit to leave the proposed rules off the Commission's list of pending regulations.

Further, in order to better understand the increasing inequality that threatens our economy and democracy, the Commission must adopt a CEO median worker pay rule that accurately captures the extent of executive pay that is provided in the form of stock. This mandatory rule was included in Section 953(b) of Dodd-Frank. I was concerned by the Commission's decision this year to delay implementation of this rule. I have written<sup>10</sup> to the SEC with a suggestion for improving the pay ratio disclosure rule, which would more accurately capture excessive CEO pay. Instead of estimating fair value, I urge the Commission to use 'actual realized gains' to determine executive pay. I have the following questions about your views on the Commission's role in regulating executive pay.

1. As a Commissioner, will you commit to supporting proposing and finalizing the mandatory Dodd-Frank rules required by Sections 956 and 954?
2. Do you believe that stock-based pay has distorted priorities for public company executives?
3. Do you believe stock-based pay has encouraged executives to buy back their company's stock?
4. Do you support the pay ratio disclosure rule and will you commit to finalizing and enforcing the mandatory rule as Commissioner?
5. Do you believe reducing the ratio of CEO to median worker pay is a worthy goal?
6. Do you believe that 'actual realized gains' is a more accurate representation of an executive's pay than 'estimated fair value'?

I would appreciate the prompt return of this letter in order to evaluate your nomination to the Commission. If you have questions about this letter, please contact Brian Conlan on my staff at 202-224-5653.

Sincerely,



Tammy Baldwin  
United States Senator

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<sup>10</sup> [Baldwin, Tammy. 'Letter to Acting Chair Piwowar'. 21 Mar 2017.](#)