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Senator Pushes SEC Commissioner Nominees on Activism, Buybacks and Executive Pay, and May Delay Confirmation Process

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Senator Tammy Baldwin (D., Wis.) has placed a hold on the nomination of Robert Jackson and Hester Peirce as commissioners to the SEC, pending their responses to the questions she raised in her letters to each of them. According to **news reports**, the senator's actions may delay the confirmation process for the two candidates, who were expected to be confirmed by expedited votes.

The letters she **sent to Jackson** and **Peirce are identical** except for questions related to an academic paper that Jackson, a law school professor, was involved with in 2011 that argued against shortening the 10-day window under Rule 13D , concluding that it would discourage shareholders from buying large blocks of stock that in turn imposes discipline on management.

Otherwise, the two letters ask for the nominees' views on activism, stock buybacks and the SEC executive pay rules under Dodd-Frank. Senator Baldwin is a co-sponsor of the Brokow Act, which targets activist hedge funds, as we **previously discussed here**.

Activism. The senator asks the potential commissioners about their views on whether the influence of "aggressive short-term oriented shareholders" have contributed to making corporate executives focus singularly on share price at the expense of long-term growth and other stakeholders such as workers and taxpayers, and also whether activist hedge funds encourage companies to cut investments in favor of stock buybacks. She poses a series of inquiries aimed at Rule 13(d), including: (a) the purpose of the 10-day window; (b) whether the current rule provides adequate disclosure; (c) the possibility of updating the definition of "person or group" to capture groups coordinating their actions to remain under the ownership threshold; and (d) supporting changing the rule if investors are found to be intentionally bypassing it through forming wolfpacks or using derivatives.

Stock Buybacks. The senator asks the nominees whether they are concerned about the rate of buybacks in recent years and what, if anything, the SEC should do to reverse the trend. She also wants to understand the nominees' perspectives as to the impact of increased buybacks on wages and jobs, and declines in R&D that may undermine global competitiveness. Focusing on rulemaking, the Senator raises the possibility of reforming Rule 10b-18 and requiring additional disclosure about buybacks.

Executive Pay Rules. Senator Baldwin seeks commitments to support finalizing the Dodd-Frank executive pay rules and enforcing the pay ratio disclosure rules. She asks Jackson and Peirce about their positions on whether stock-based pay has "distorted priorities" for executives and encouraged executives to buy back their company's stock. She also wants to know their opinions on her earlier efforts to get the Commission to use "actual realized gains" to determine executive pay for the pay ratio rule.

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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