

Some questions being considered about stock buybacks in these volatile markets

March 9, 2020

U.S. and global stock markets have experienced a significant downturn and increased volatility stemming from the coronavirus, this weekend's shock in the commodity markets and related factors.

We have been getting a broad array of questions on techniques and best practices for possible buybacks, given the potential opportunity to buy back stock at materially reduced prices, including:

- Are the length and timing of the Company's "black-out period" appropriate or unduly conservative? Most companies have a black-out policy that restricts purchases by executives starting late in the quarter, but there is a wide disparity in the restrictions of these policies.
- To what extent and under what conditions can a company repurchase stock during the black-out period? Black-out policies typically do not preclude a company from repurchasing stock if it does not possess material non-public information, but what are the risks of doing so?
- Should a Company consider a program of open-market purchases under Rule 10b-18 within its window periods?
- Should a Company consider a Rule 10b5-1 plan put in place during a window period, so as to permit its agent bank to continue purchases within specified parameters during a black-out period?
- Should a Company consider a large buyback up front, to get the full benefit of the market disruption? If so, should a program such as an accelerated share repurchase be executed, whereby the Company and a bank enter into a transaction involving a large forward purchase and the Company gets to treat the full amount of shares as repurchased on day one for financial accounting purposes, with an immediate resulting EPS accretion?
- Companies are also weighing up whether and to what extent it may be a prudent exercise of business judgment to borrow under existing credit facilities or raise other funding to execute stock buybacks.
- What, if any, public disclosure should be made when the Board approves a buyback program or the Company commences stock repurchases? The answer to which is a function of the materiality and manner of effecting the stock buyback program.

For these decisions, a Board that acts without any conflict, is well-informed, and goes through a proper process in deliberating to reach a decision, will be protected by the business judgment rule.

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