



THE CHAIR

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
WASHINGTON, D.C. 20549

January 29, 2016

The Honorable Tammy Baldwin
United States Senate
717 Hart Senate Office Building
Washington, DC 20510

Dear Senator Baldwin:

Thank you for your November 16, 2015 letter expressing continuing concern about the scope and extent of stock buybacks and their potentially manipulative effect on short-term share prices. You also inquire about what steps the Commission is taking to enforce the anti-manipulation provisions of the securities laws with respect to buybacks, as well as how the Commission is working to improve its data collection efforts for stock buybacks.

As part of our ongoing mission to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation, the Commission continually works to help ensure that the general anti-manipulation provisions of the federal securities laws and Commission rules are being properly and effectively applied and enforced with respect to all securities transactions, including stock buybacks. In enforcing these anti-manipulation rules, the Commission's staff investigates attempts by interested parties (including issuers) to artificially affect a security's market price. This includes bringing enforcement actions against persons alleged to have manipulated common stock prices, which are discussed further below.

Your letter also asks whether the Commission has opened any investigations into specific questionable buyback practices. While I cannot discuss specific investigations, the Commission actively works to identify and investigate misconduct connected to stock buybacks. For example, Commission staff conducts investigations and brings enforcement actions for manipulation in connection with stock buybacks where parties do not comply with Sections 9(a)(2) and 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 thereunder.¹ Even when a party asserts that it complied with every provision of the Rule 10b-18 safe harbor, Commission staff in connection with an investigation will still assess whether the party has actually complied with each of the provisions of Rule 10b-18, or whether there is sufficient

¹ See, e.g., *SEC v. Wey, et al.*, Civil Action No. 15-cv-7116, S.D.N.Y., filed Sept. 10, 2015 (charging defendants with market manipulation in connection with a stock buyback program under Section 10(b) and Rule 10b-5); see also *SEC v. Competitive Technologies, Inc., et al.*, Civil Action No. 3:04-cv-1331, D. Conn., filed Aug. 11, 2004 (charging defendants with market manipulation in connection with a stock buyback program under Section 10(b) and Rule 10b-5). In *Competitive Technologies*, the court denied defendants' motion to dismiss based on Rule 10b-18 noting that "actions for manipulation that are predicated on allegations and evidence other than the timing, price, amount, and manner of purchases are not barred by Rule 10b-18." *SEC v. Competitive Technologies, Inc., et al.*, 2005 WL 1719725, *3 (D.Conn., July 21, 2005).

evidence that such party had the purpose or intent to manipulate prices or otherwise engage in manipulative conduct. The Commission also investigates and has brought enforcement actions for other misconduct in connection with stock buybacks, primarily insider trading violations.²

The Commission is working to improve data collection efforts as well. On July 18, 2012, the Commission adopted Rule 613 under the Exchange Act to require national securities exchanges and national securities associations to submit a national market system (NMS) plan to create, implement, and maintain a consolidated order tracking system, or consolidated audit trail (CAT), with respect to the trading of NMS securities. The CAT, if approved, would capture customer and order event information for orders in NMS securities, across all markets, from the time of order inception through routing, cancellation, modification, or execution. A customer identifier that consistently and uniquely identifies each customer, such as issuers, across all broker-dealers may in the future enable regulatory staff to isolate stock buybacks from trading data. A consolidated audit trail should make the overall process of identifying and analyzing issuer trading practices much more focused, accurate, and efficient. It also should help staff monitor the use and extent of stock buybacks. On September 30, 2014, SROs submitted to the Commission an initial NMS plan proposal. On February 27, 2015, the SROs submitted to the Commission an amended and restated NMS plan proposal, and on December 23, 2015, the SROs submitted an amendment to the plan. The NMS plan can be found at <https://www.sec.gov/divisions/marketreg/rule613-info.htm>. As required by Commission rules, this proposed NMS plan will be noticed for public comment.

You have also requested that the Commission improve its data collection by mandating that issuers make daily disclosure of stock buybacks, including the prices paid. Currently, Item 703 of Regulation S-K requires disclosure of stock buybacks on a quarterly basis in a tabular format by month. As part of the staff's review of the business and financial information required by Regulation S-K, I have directed the staff to seek input from investors, companies, and market participants about the need for more frequent and more granular information about issuer stock buybacks than is currently required.

You have also requested that the Commission require annual disclosures of the performance metrics used by a firm to compensate its executives, including specific information on stock-based metrics, such as earnings-per-share. Item 402(b) of Regulation S-K requires a discussion and analysis of all the material elements of a company's compensation of its named executive officers. If a performance target, which would include a stock-based metric, is material to a compensation decision for a named executive officer, the company is currently required to disclose the performance target.³ As part of our disclosure effectiveness review, as our staff moves from its review of business and financial disclosures to compensation and governance matters, this aspect of our disclosure requirements will be considered as well.

² See, e.g., *SEC v. Wang, et al.*, Civil Action No. 13-cv-02270-L-WVG, S.D. Cal., filed Sept. 23, 2013 (charging defendants with insider trading for trading ahead of company announcement of a stock buyback program); *SEC v. Powell*, Civil Action No. 6:11-cv-00161, W.D. Tex., filed June 10, 2011 (charging defendant with insider trading for trading ahead of his company's stock buyback initiative).

³ Pursuant to Instruction 4 to Item 402(b), the required disclosure excludes target levels involving confidential trade secrets or confidential commercial or financial information where disclosure would result in competitive harm for the company.

The Honorable Tammy Baldwin
Page 3

Thank you again for your letter on this important subject. Please do not hesitate to contact me at (202) 551-2000, or have a member of your staff contact Tim Henseler, Director of the Office of Legislative and Intergovernmental Affairs, at (202) 551-2010, if we can be of further assistance.

Sincerely,

A handwritten signature in blue ink that reads "Mary Jo White". The signature is written in a cursive style with a large, sweeping initial "M".

Mary Jo White
Chair