

## [Securities Regulation Daily Wrap Up, TOP STORY—Commissioner Jackson confirms plans to leave SEC in February, \(Jan. 16, 2020\)](#)

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Commissioner Jackson's term at the SEC will be remembered for the way he incorporated original research into his speeches about, and votes on, major regulatory initiatives such as Regulation Best Interest.

SEC Commissioner Robert J. Jackson, Jr. said that he plans to leave the Commission on February 14, 2020 after having remained on for a period of time after the expiration of his term. Jackson was sworn in as a commissioner on January 11, 2018 and has since that time provided the dissenting voice in key rulemakings such as Regulation Best Interest (BI) while simultaneously publishing independent research on a variety of topics. Jackson confirmed his departure plans in an email message to *Securities Regulation Daily*.

**A return to public service?** Jackson's departure from the SEC will bring him back to New York University where, before joining the Commission, Jackson was a [law professor](#). He had previously taught at Columbia Law School where he also was Director of the school's Program on Corporate Law and Policy and was the founding director of the school's data lab. Jackson also was senior policy adviser to Treasury's Special Master for TARP Executive Compensation, the subject matter in which he had concentrated while in private practice at the law firm Wachtell, Lipton, Rosen & Katz.

"Serving on the Commission has been the privilege of my lifetime," said Jackson via email. "I will always be proud to have served alongside my fellow Commissioners, Chairman Clayton, and especially the Commission's Staff, who dedicate their careers to protecting ordinary investors—and give hardworking American families the chance to build a better future."

SEC Chairman Jay Clayton [said](#) of Jackson: "On many occasions over the past two years, I and the Commission have benefited from substantive engagement with Commissioner Jackson on a range of issues important to our markets. I will miss discussing policy issues with Rob, including how the Commission can continue to advance its three-part mission and best serve our Main Street investors."

Moreover, could Jackson's inclusion in his email message of a quote from former Commissioner Kara Stein suggest that he may contemplate a return to public service? "Rob has been a relentless advocate for making sure our modern markets remain the fairest and most efficient in the world. I hope our country will be fortunate enough to have him engage in public service again in the future," said Stein.

**Signature dissent from Regulation BI.** Regulation BI may become the signature achievement of the Clayton-led SEC, even as the SEC's agenda recently has become more active on a number of controversial topics, including proxy advisers and the eligibility and resubmission thresholds for shareholder proposals. The SEC in [Regulation BI](#) imposed a heightened standard for broker-dealers who advise retail investors, but without implementing the SEC's Dodd-Frank Act authority to impose a true fiduciary standard for advice retail investors. The Commission adopted Regulation BI in June 2019 in a 3-1 vote along with several additional interpretations for broker-dealers and investment advisers. Regulation BI became effective September 10, 2019 and compliance with it is required by June 30, 2020.

Jackson's opposition to the final version of Regulation BI set the stage for his signature [dissent](#) from its package of reforms and related interpretations. First, Jackson observed that final Regulation BI does not define "best interest" and the rule could allow conflicts to be resolved through disclosure. Jackson also said that despite his request for SEC staff to examine the economic impact of Regulation BI, the final regulation contained only a "conclusory" economic analysis. Second, with respect to investment advisers, Jackson noted that the final

investment adviser [interpretive release](#) excluded language that was part of a proposing release that would have stated that an investment adviser must put its client's interests first.

Jackson also said that America has a "savings crisis" and that too many people are unable to save enough to fund their retirements. He concluded his dissent thus: " I call on all of you who have been so crucial to this effort to keep fighting. Encourage investors to seek out true fiduciary advice from financial professionals who have chosen to hold themselves to higher standards than those we've set today. Keep pushing for meaningful protections in the States who choose to give their citizens the best chance for a safe retirement. And, most importantly, do not stop the critical work of advocating for the financial security of all Americans" (footnote omitted).

Clayton offered a spirited [defense](#) of Regulation BI barely over a month after it was adopted in which he addressed some of the concerns raised by Jackson. For one, Clayton said he "disagree[d]" with claims that Regulation BI was poorly drafted because it failed to define "best interest" or require brokers to recommend the "best" security. Clayton said the Commission had listened to commenters who asked for a principles-based approach that does not focus on a "best product" or foreclose application of the regulation as the facts and circumstances of retail advice evolve over time. Clayton also characterized as "flatly wrong" the notion that the investment adviser interpretation had weakened standards about putting clients' interests first.

Regulation BI has been [challenged](#) in federal court by a group of states and by financial planners on grounds that its adoption violated the Administrative Procedure Act. Thus far, however, a court challenge focused on whether Regulation BI preempts state regulations that impose a higher fiduciary standard has not materialized, although several states, such as [Nevada](#), [New Jersey](#), and [Massachusetts](#), are moving towards adoption of such a heightened standard. If, and when, a preemption challenge arises, courts will likely focus on interpreting provisions in the National Securities Markets Improvement Act of 1996, which expressly preempted some types of state broker-dealer regulations while preserving states' general antifraud enforcement authorities.

**Political spending disclosure.** Before joining the Commission, Jackson was a signatory to an SEC [rulemaking petition](#) asking the Commission to adopt rules for public companies to disclose their political spending habits to shareholders and the investing public. However, Republican-led Congresses during the past several years have squelched SEC action by including a policy rider in must-pass appropriations legislation that bars the SEC from using its funds to finalize political spending disclosure rules, a trend that continues even though Democrats recently re-took the House. The petition Jackson signed has generated a massive number of comments submitted to the Commission.

Moreover, Jackson recently [praised](#) retired Delaware Chief Justice Leo E. Strine, Jr. for his ideas on how to "protect the American families who rely upon our companies to build a sustainable future." Jackson and Strine could be said to generally have similar views on disclosure of corporate political spending. Although the chances for enactment in 116th Congress are low, some of the principles expressed by Jackson and Strine have been enshrined in proposed legislation such as the Accountable Capitalism Act ([H.R. 7294](#); [S. 3348](#)), originally sponsored in the last Congress by Sen. Elizabeth Warren (D-Mass) (who is also running for president), and in the [Shareholders United Act \(H.R. 936\)](#), sponsored by Rep. Jamie Raskin (D-Md), which was included in the For The People Act ([H.R. 1](#)), which did pass the House in March 2019 by a [vote](#) of 234-193.

**Jackson's focus on data and research.** Unlike many SEC commissioners who have relied exclusively on the SEC's Division of Economic and Risk Analysis (DERA) for research on current securities topics, Jackson has sometimes engaged his SEC staff for the purpose of charting his own research path as a commissioner. Two examples highlight the different approaches. First, in the wake of the Great Recession, a bipartisan trio of commissioners in 2012 [requested](#) data on money market funds from DERA's predecessor before they would back a [proposal](#) on money market fund reforms. Second, in his [first substantive speech](#) as a commissioner, Jackson published the results of his own "preliminary" study of dual-class "forever shares." Jackson said his data suggested that while dual-class structures can help a newly public company, the benefits often decrease over time and the company's valuation begins to lag versus its peers without dual-class structures or that have given them up.

More recently, academic research Jackson participated in before joining the Commission appeared to bear fruit when the House [passed](#) the 8-K Trading Gap Act with overwhelming bipartisan support. The bill would prohibit company insiders from trading company stock during the four business day window between when a corporate event becomes reportable or disclosable on Form 8-K. In a 2015 paper titled [The 8-K Trading Gap](#), Jackson, along with co-authors Alma Cohen and Joshua Mitts, studied numerous factors that could either encourage or discourage insider trading during the 8-K window. The study concluded: "Our evidence shows that public-company insiders trade during the 8-K gap—and earn economically and statistically meaningful profits when doing so."

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