Securities Regulation Daily Wrap Up, CORPORATE GOVERNANCE—FY23 White House budget emphasizes corporate taxes, share buybacks, (Mar. 28, 2022)

Securities Regulation Daily Wrap Up

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By Mark S. Nelson, J.D.

The Budget Request would target reforms of numerous tax rules that can apply to digital assets in addition to proposing higher taxes for millionaire and billionaires and for corporations.

The Biden Administration's FY23 Budget Request contains a variety of provisions that would impact corporations in the form of higher tax rates and limits on executive's sales of stock following share buybacks. The budget document also targets digital assets and antitrust enforcement. While many of the tax proposals are similar to those already floated in the defunct Build Back Better Act, the proposed holding period for executives at companies conducting share buybacks would appear to be a shift away from the previously proposed excise tax on share buybacks.

President Biden described the Budget Request as "a budget that includes historic deficit reduction, historic investments in our security at home and abroad, and an unprecedented commitment to building an economy where everyone has a chance to succeed." Treasury Secretary Janet Yellen, referencing recent economic growth, said in a statement that "[t]his economic rebound allows us to look beyond the pandemic-induced crisis and provide a roadmap to address future challenges: creating a tax system that is fair to working families, expanding access to capital in disadvantaged communities, and safeguarding the financial system." The Treasury Department also released its latest Greenbook of proposals to reform the U.S. tax system, including, for example, taxing carried interest at ordinary rates instead of at capital gains rates.

Share buybacks. The FY23 budget would renew efforts by the Biden Administration to curb stock buybacks and other transactions in company shares by corporate insiders. As proposed, it appears the proposal could focus less on the previously proposed excise tax on stock buybacks and more on ensuring that corporate executives have skin in the game.

"The President also supports legislation that would align executives' interests with the long-term interests of shareholders, workers, and the economy by requiring executives to hold on to company shares that they receive for several years after receiving them, and prohibiting them from selling shares in the years after a stock buyback," said the Budget Request. "This would discourage corporations from using profits to repurchase stock and enrich executives, rather than investing in long-term growth and innovation."

The skin in the game approach has been previously floated by Sen. Elizabeth Warren (D-Mass), whose Accountable Capitalism Act (See Section 7) would impose a three-year holding period on a company's executives' sales of company stock after a buyback. Other recent attempts by lawmakers to curb buybacks have tended to focus on a range of options from outright bans to conditioning buybacks on improved working conditions for employees. (See, e.g., S. 3540/H.R. 3355; S. 3215/H.R. 6056; and S. 3640/H.R. 7145).

Senator Warren, joined by three of her Democratic colleagues, issued the following statement on the inclusion of the holding period in the president's FY23 Budget Request: "We are pleased that President Biden's Budget calls for addressing the misaligned incentives that encourage excessive stock buybacks, often at the expense of investments in workers, innovation, and communities. Congress needs to address this issue, and we're working on common-sense legislation that will reform executive compensation and incentivize American companies to prioritize long-term economic growth."

The Biden Administration’s now defunct Build Back Better Act had included a direct tax on share buybacks. Specifically, Section 138102 would have imposed a one percent excise tax on stock repurchases by corporations whose stock is traded on established securities markets. A “repurchase” of stock would have been defined consistent with IRC Section 317(b), which provides that stock is considered redeemed by a corporation if the stock was acquired from a shareholder in exchange for property, regardless of whether the acquired stock was cancelled, retired, or held as treasury stock. The excise tax also would have applied to any transaction the Treasury Secretary determined is economically similar to a stock repurchase. The stock buyback excise tax, however, would not have applied to certain enumerated transactions. Congressional Democrats had initially proposed a 2 percent excise tax on share buybacks.

Tax rates for individuals and corporations. The FY23 White House Budget Request would address both individual and corporate tax rates. Individuals with more than $100 million would be subject to a minimum tax of 20 percent. During a press briefing on the Budget Request, OMB Director Shalanda Young also confirmed that the top rate for individual taxpayers would return to 39.6 percent. Prior to the 2017 Tax Cuts and Jobs Act, individual rates were set at: 10 percent; 15 percent; 25 percent; 28 percent; 33 percent; 35 percent; and 39.6 percent. After enactment of the TCJA, however, individual rates were temporarily set at: 10 percent; 12 percent; 22 percent; 24 percent; 32 percent; 35 percent; and 37 percent. The TCJA sunsets its lower individual tax rates for tax years after December 31, 2025.

Moreover, the corporate tax rate would rise from the TCJA-imposed rate of 21 percent of taxable income to 28 percent although, as the Budget Request notes, the proposed rate would be significantly below the 35 percent rate the prevailed in the years before the TCJA lowered the corporate rate. The Budget Request also would seek to limit the use of corporate tax havens to undermine the global minimum corporate tax rate agreed to last year by the U.S. and more than 130 countries.

Digital assets. A significant portion of the budget request would seek to modernize rules for digital and other assets to produce a projected decrease in the deficit of nearly $11 billion over ten years. The rules to be targeted would address: (1) the treatment of loans of securities as tax free to include other asset classes and address income inclusion; (2) information reporting by financial institutions and digital asset brokers; (3) reporting by taxpayers of foreign digital asset accounts; and (4) bringing digital assets within the mark-to-market rules.

Antitrust enforcement. The president’s FY23 Budget Request also would provide significant additional funding to antitrust enforcement agencies. Specifically, the plan would allocate $88 million to the DOJ’s Antitrust Division and $139 million to the FTC. Although the proposed amounts are smaller, the Budget Request is similar to funding provisions that the Biden Administration had proposed in the Build Back Better Act. Sections 62001 and 62002 of the BBBA would have allocated $500 million each to the DOJ for the Antitrust Division’s work related to competition or enforcement of antitrust laws and to the FTC for its work related to unfair methods of competition or enforcement of antitrust laws.

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