

INTRODUCTION

The Senate Bill S.2720 referred to as the *Brokaw Act* introduced to the house of Senate in the United States by Senator Baldwin, Senator Berkley, Senator Sanders and Senator Warren was drafted in a bid to effect various changes to the regulatory framework governing the acquisition and trading of securities within the economy. The act makes various changes with regard to filing of an interest towards a particular security or investment from 10 days to 2 working days. The Act also made changes to the effect that various existent disclosure should be made with respect to any short positions held over 5%. The Act also outlines how beneficial ownership should be declared within an organization and the declaration or clear indication of the presence of any direct or indirect pecuniary interests within the company. Various disclosures on matters pertinent to voting or dispositive power should also be highlighted in a bid to be compliant with the Act. This ensures that investors declare all their shares held in various forms of derivatives and not just equity securities or easily convertible securities. The Brokaw law also requires the disclosure of hedge funds and groups of hedge funds with regard to various investment portfolio interests they may have within a particular industry or company.

The report seeks to critically analyze the Brokaw Law and evaluate its relevance within the framework governing the acquisition, disclosure, and disposition within the economy. The study will make use of various informative and scholarly articles written in a bid to assist in the critical analysis of the Act. These include the article by David Katz et. al., David Benoit, Sarah Krouse et. al., among others provide an insight into better understanding the underlying concept behind the introduction of the Brokaw Act by analyzing the benefits that may be accrued as well as the inherent risks and negative attributes associated with the enactment of the Law. The Brokaw Act like many other preceding laws has various proponents and opponents from both sides of the divide, and each party strives to ascend higher than the other party in a bid to indicate support or condemn the Law. On the opponents of the Brokaw Law, the study will analyze the works of David Benoit while some of the works that clearly outline proposition towards the Brokaw Law include those by David A. Katz and Sarah Krouse and Tom McGinty. The critical review of the highlighted works would help describe what the Brokaw Law essentially touches on concerning marketable securities and also indicate whether it would be prudent to support or oppose the enactment of the Bill to Law.

PROPONENTS OF THE BROKAW LAW

In a bid to indicate support for the Brokaw Law, various scholars have developed an elaborate means through which they outline the advantages of enacting the Brokaw Law in a bid to safeguard the interests of various companies within society. This is because a certain trend had developed among various hedge funds and corporations to obtain minority interests through purchase of shares or stock options within large and well-performing companies so as to influence decisions in the management of the organization. They do so by gaining seats within the board of management thus have a vantage point in influencing various outcomes within the organization such as the hiring and firing of top management, the ouster of some board members within the company among other poor decisions that may be detrimental to the company's image.

In light of the foregoing, the articles and papers reviewed by the report advocate on the fact that there is need for the development of a regulatory framework to be in place in a bid to tame the actions of the so-called passive investors who make acquisitions and hold stakes in numerous companies in a bid to have an influence over certain decisions made by the company. These investors carry out various campaigns against various corporations by acquiring interests through stock options thus initiate poor decisions which may eventually lead to the downfall of the corporation. Some of the reviewed works that highlight the importance of the Brokaw Law is as follows;

David A. Katz, Laura A. McIntosh

Through their article Corporate Governance Update: Holding Activists and Proxy Advisory Firms Accountable (Katz & McIntosh, May 2016), they indicated that the emergence of various hedge funds which carry out activism agendas within society by influencing shareholders in some corporations to make certain demands and changes. Such include the removal of members of the board of management, hiring and recruitment process of top tier managers among other major decisions that may affect the performance and stability of the company.

They advised on the need for the development of a comprehensive oversight framework within which various vices and characteristics may be nurtured such as the development of transparency and accountability in activities carried out by the proxy advisory firms and various hedge fund investors in a company. An efficient regulatory mechanism would ensure the unbiased co-ordination of company affairs among shareholders in a harmonious manner without the need to influence various decisions affecting the management and performance of the company.

Some of the factual and logical evidence presented by the study are to the effect that the introduction of various proxy advisory firms as activist investors within a particular corporation may lead to the detriment and subsequent fall of the corporation due to adverse influence by these passive investors in a bid to take over the control and management. Some of these investors have reached a point whereby they have influence over the development of various public policies, especially within Wall Street. They included the following;

Within the period of April 2016, an individual by the name of William Ackman who represented a firm named Pershing Square was summoned to testify before a Senate Committee with regard to investments purportedly made in his name to a pharmaceutical firm known as Valeant Pharmaceutical International. Other firms also mentioned within which he held significant interests in various forms included Fannie Mae, Freddie Mac, and Herbalife. The Pharmaceutical Company, Valeant had adopted a strategy whereby they made drug acquisitions from different sections of society and influenced an increase in price level thus undermining the value of research and Development invested in the ultimate production of the drug. The result of these actions was the short-term increase in the stock valuation of the company and shareholders' interests within Valeant increased significantly.

Various analysts and speculators quoted the security as a viable investment for making short term gains. However, this led to the increase in costs of healthcare to patients who sought various services in hospitals thus Valeant's strategies were in direct contravention of society's welfare and would negatively affect the running of hospitals across the country. Both the Democratic and Republican Senators' spoke vehemently against the practices and strategies adopted by Ackman and the Valeant CEO Michael Pearson. They argued that the continued existence of such practices would prove to be substantially detrimental to society as it would significantly push up the cost of healthcare making it unaffordable and out of reach to some people yet some individuals would be benefiting immensely from the enterprise.

In supporting the Brokaw Law, the members highlighted the need to render irrelevant various outdated disclosure practices that existed within companies. This would seek to ensure that various groupings of investors should not have the undue influence over a corporation as it would lead to wealth acquisition by the individuals while neglecting the interests of the workers and taxpayers. The Brokaw Law would ensure various interests in companies by investors are disclosed.

The concerns raised by the Senate Committee were factual and logical as it was assumed that the continued increase in the cost of healthcare services provision would make it unaffordable to a section of the society. This would also lead to an increase in the health insurance premiums charged to individuals to access the healthcare services. Thus the action by Valeant through its top management and the perceived influence emanating from the stake acquisition of Ackman led to direct contravention of public interests in a bid to make profits which are very wrong.

Sarah Krouse and Tom McGinty

In their article, *The New Corporate Power Brokers: Passive Investors* (Krouse & McGinty, 2016), they outlined that the emergence of passive funds and the active role by various index funds and hedge funds such as BlackRock Inc. has led to undue influence over the corporations which are acquired by these companies. They outlined a trend whereby passive mutual funds are accumulating large stakes in big companies thus exceeding the holdings of actively managed funds and gradually gaining influence over the enterprises that have been acquired.

The study cited enormous evidence and examples that indicate how the vice of passive investor activism has led to the detriment of various corporations across the globe. The case of Green Dot Corp, a prepaid company, incorporated within the United States. An investor by the name Jeffrey Osher and his fellow advisers were dissatisfied with the running of the business and advocated for the ouster of the Chief Executive. They were later to learn that Vanguard Group, the fourth largest shareholder had changed its vote prior to the occurrence of the meeting in support of the CEO. This represented what enormous power was held by these Passive funds which make acquisitions to various companies of interest in a bid to gain influence and have a vantage point in terms of making decisions within the organization(Sorkin, 2015).

Another cited example is that of BlackRock Inc. which in June 2016 influenced a decision through a vote in an organization known as Mylan NV. The Passive Fund BlackRock voted against the executive pay plan defined by Mylan NV. Since then; the company has been caught up in a tussle over the pricing of an allergic reaction drug known as EpiPen. BlackRock is also cited to have cast an influential vote with respect to a merger occurrence between professional service providers Towers Watson & Co and Willis Group Holdings PLC. This is a clear indication of the undue power and influence held by these passive funds thus there is the need to introduce a framework

which regulates the governing and conduct of these funds in a bid to control their undue influence over various corporations in the United States.

The Brokaw Law has made various provisions in a bid to ensure that a regulatory framework is followed. This is through various clauses such as Section 13D which reduces the filing time for various interests in a company from 10 to 2 business days. The Brokaw law also clearly outlines the regulations with regard to beneficial ownership within an organization in that an elaborate declaration of any existent pecuniary interest within an organization should be made in a bid to determine the appropriate profit share and other incomes such as dividends that may be obtained from the organization. Hedge funds have also been authorized to declare any acquisition made within an organization within a timely manner in a bid to ensure other members of the company are made aware of the prevailing developments in ownership. This law also outlines the framework governing the voting process that is conducted within the organization's setting in a bid to regulate the undue influence that some shareholders may have over the company.

OPPONENTS OF THE BROKAW LAW

The Brokaw law, however also attracted negative connotations and sentiments from various quarters as the concerned parties felt that it would contravene various management practices and the process of disclosing shareholders holding interests in a company would make investors shy away from making investments.

David Benoit

In His article titled; Don't Make Me Do This: Rise of the Reluctant Activist, (Benoit, 2016) he made the assertion that over the years, there has been a visible trend whereby passive investors were adopting various activist practices in the course of carrying out their investments within various corporations. This led to the influencing of different shareholders in an organization which he described as "suggestivists" or "reluctivists" who vehemently agitated for corporate change within the organization.

With regards to the new law making alterations to the disclosure of interests in various companies, he held the view that these changes in securities laws would lead to an expansion in investor rights and encourage investors to speak out against various injustices and imperfections occurring within an organization. (Foley, 2014) This is evident especially among long-term shareholders who may make various discoveries to the effect that the

company is ignoring numerous opportunities which may prove to be beneficial to the improved market value and performance of the company. These acts initiated by the long-term investors show concern for the company and continued support over the years in a bid to ensure that it operates efficiently and in a conducive environment into the foreseeable future. These long-term investors may also offer management advice on undertaking various investments and the inherent risks associated with any investments or projects undertaken.

The study cited an example as evidence of the positive attributes that disclosure of various interests held by long-term shareholders would bring. An investment firm named Artisan Partners owned by Daniel O' Keefe had made an assertion to the effect that Johnson & Johnson should make a corporate action of separating its three leading businesses. Artisan Partners has a 0.2% stake in the company that has a market value of \$284 Billion, and this fact has been adequately and appropriately disclosed to the public. The top tier management of J & J met Mr. Keefe on some occasions to get an insight as to the advice he provided about the separation of the businesses. He indicated that the advice provided was not spontaneous but rather emanated from a careful analysis of the company's performance, market stabilization and share price valuation over the years. Through the careful analysis, he felt the need for the separation of the businesses into its three main components.

Essentially, David Benoit felt that the introduction of the law governing the disclosure framework of various interests in society was detrimental as it would lead to the shying away of potential investors for fear that they would be patronized for making any agitations with regard to the proposition of any changes that may be initiated by them. The law would also limit various voting rights and powers accorded to the investors thus serve as a handicap towards the agitation for change within the organization.

CONCLUSION

In light of the foregoing, various arguments and assertions have been made with regard to the need for the development of the Brokaw Law and the various benefits accrued as a result as well as the possible setbacks that may also be experienced been brought out. Essentially, the development of the Brokaw Law was to ensure that a regulatory framework was in place since it has been clear that the emergence of various hedge funds has led to the undue influence and poor decisions made by various corporations listed. The study by David Katz et. al. cited a clear example whereby the actions of the Pharmaceutical firm Valeant and that of the hedge fund company Pershing Square were put to task since they were engulfed in the profit motive to notice

that the overpricing of various drugs led to the increased cost of healthcare services provision within the hospitals and led to immense suffering by patients. The making of such decisions that contravene the interests of society for personal gain are detrimental towards the welfare of the public and as such should have a regulatory framework governing them.

It is in this view that I would like to advise the Senator to bid his support for the Brokaw Law as it seeks to protect the interests of the general public. It would be prudent as it aims at ensuring an efficient mechanism and enabling environment within which various companies exist and operate.

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