



# Americans for Financial Reform Education Fund

February 29, 2024

Chair Gary Gensler  
U.S. Securities and Exchange Commission  
100 F Street, N.E.  
Washington, D.C. 20549

## **Re: Reproposing the Share Repurchase Disclosure Modernization Rule**

Dear Chair Gensler:

The undersigned organizations urge you to repropose the share repurchase disclosure modernization rule to provide investors with important information about this widespread yet opaque practice.

The recent legislative and regulatory history of share repurchases, the results of deregulation on share repurchase activity, recent policy changes, and escalating calls for action all powerfully make the case that the status quo is untenable and that the SEC needs to act with urgency to repropose a rule that would provide disclosures necessary to protect investors, maintain fair, orderly, and efficient markets, and facilitate capital formation.

### **Recent Legislative and Regulatory History of Share Repurchases**

A quick review of the recent legislative and regulatory history of share repurchases provides important context to the SEC's recent rulemaking; it reveals a seismic shift in how regulators and market participants have understood this practice.

After the adoption of the Securities Exchange Act of 1934, companies could be held liable for market manipulation under sections 9(a)(2) and 10(b) when they engaged in share repurchases in the open market. Later, the Williams Act of 1968 clarified that it is unlawful for issuers to repurchase their own securities if the purchase "is in contravention of such rules and regulations as the Commission . . . may adopt (A) to define acts and practices which are fraudulent,

deceptive, or manipulative, and (B) to prescribe means reasonably designed to prevent such acts and practices.”<sup>1</sup>

A proposed rule preceding the one that was ultimately adopted by the SEC would have: 1) imposed stricter limits on share repurchases than those ultimately adopted; 2) made share repurchases beyond those limits unlawful; and 3) required insiders to disclose whether they were considering trading during repurchases.<sup>2</sup>

However, in 1982, the SEC dramatically changed course: it took what amounted to deregulatory action by adopting Rule 10b-18. This rule created a massive safe harbor that established very generous limits and conditions under which share repurchases would not be considered market manipulation. The rule did not outlaw share repurchases outside of the safe harbor, create a presumption of market manipulation for share repurchases falling outside the safe harbor, or even require the disclosures necessary for the SEC to detect whether issuers’ share repurchases were staying within the safe harbor.<sup>3</sup>

Had the Fifth Circuit Court of Appeals not sided with the Chamber of Commerce by striking down the rule the SEC finalized last May, the SEC would have had access to the information necessary to enforce its very generous safe harbor for the first time. Additionally, investors would have gained access to important information about a widespread practice, including whether certain officers and directors bought or sold their company’s shares within four business days of the announcement of a share repurchase plan.<sup>4</sup> The finalized rule would not have changed the fact of the generous safe harbor, created a presumption of market manipulation for share repurchases falling outside it, or established trading restrictions by officers and directors.

## **Results of Deregulation on Share Repurchase Activity**

Unsurprisingly, share repurchases have skyrocketed in this deregulated environment. In the 2010s, companies spent a total of \$6.3 trillion in share repurchases in the open market — equivalent to 4% of that decade’s U.S. GDP.<sup>5</sup> During the pandemic, companies spent \$521

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<sup>1</sup> Lenore Palladino & William Lazonick, “Regulating Stock Buybacks: The \$6.3 Trillion Question,” 5-6, Roosevelt Institute, May 2021, *available at*

[https://rooseveltinstitute.org/wp-content/uploads/2021/04/RI\\_Stock-Buybacks\\_Working-Paper\\_202105.pdf](https://rooseveltinstitute.org/wp-content/uploads/2021/04/RI_Stock-Buybacks_Working-Paper_202105.pdf); Williams Act, Pub. L. No. 90-439, 82 Stat. 455 (1968).

<sup>2</sup> Lenore Palladino & William Lazonick, “Regulating Stock Buybacks: The \$6.3 Trillion Question,” 6, Roosevelt Institute, May 2021, *available at*

[https://rooseveltinstitute.org/wp-content/uploads/2021/04/RI\\_Stock-Buybacks\\_Working-Paper\\_202105.pdf](https://rooseveltinstitute.org/wp-content/uploads/2021/04/RI_Stock-Buybacks_Working-Paper_202105.pdf).

<sup>3</sup> *Id.* at 7.

<sup>4</sup> See SEC Fact Sheet: Share Repurchase Disclosure Modernization, *available at* <https://www.sec.gov/files/34-97424-fact-sheet.pdf>.

<sup>5</sup> *Id.* at 16.

billion on share repurchases,<sup>6</sup> even as many employees were losing their jobs and many others were being forced to work in unsafe conditions. Meanwhile, because the bulk of their compensation is equity-based, executives have an incentive to exercise share repurchases opportunistically to artificially inflate their own pay.<sup>7</sup>

Recent, notable examples have called into question the wisdom of significant spending on share repurchases that may come at the potential cost of underinvesting in critical safety and workforce investments. For example, Norfolk Southern spent \$6.5 billion in 2021 and 2022 on share repurchases before the 2023 train derailment in East Palestine, Ohio.<sup>8</sup> As another example, Abbott authorized \$8 billion in share repurchases in 2019-2021 before recalling contaminated baby formula in 2022, which contributed to a national baby formula shortage.<sup>9</sup> Lastly, UAW striking workers called attention to the big three U.S. automakers' 1,500% increase in spending on share repurchases over the last four years as part of the argument for the appropriateness of their wage increase demands.<sup>10</sup> All the while, investors, other market participants, and the SEC lacked basic information about share repurchase activities in all these companies.

### **Recent Policy Changes and Escalating Calls for Action**

The rampant and opaque use of share repurchases bred by deregulation has resulted in recent policy changes and escalating calls for action. For example, the Inflation Reduction Act imposed a 1% excise tax on share repurchases<sup>11</sup> and President Biden's last State of the Union address called for stronger policy responses on the issue.<sup>12</sup> Additionally, the Department of Commerce

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<sup>6</sup> Bob Pisani, "Stock buybacks surge to likely record highs, but a tax from Congress poses a threat," CNBC, Oct. 27, 2021, *available at* <https://www.cnbc.com/2021/10/27/stock-buybacks-surge-to-likely-record-highs-but-a-tax-from-congress-poses-a-threat.html>; "Tax Corporate Stock Buybacks that Enrich Executives and and Worsen Inequality," 1, Americans for Financial Reform & Take On Wall Street, Nov. 2021, *available at* <https://ourfinancialsecurity.org/wp-content/uploads/2021/11/AFR-TOWS-buyback-tax-FS-11-21.pdf>.

<sup>7</sup> See William Lazonick, "Profits Without Prosperity," Harvard Business Review, Sept. 2014, *available at* <https://hbr.org/2014/09/profits-without-prosperity>; Lenore Palladino, "Do corporate insiders use stock buybacks for personal gain?" 168, International Review of Applied Economics, Jan. 16, 2020, *available at* <https://doi.org/10.1080/02692171.2019.1707787>; Robert J. Jackson Jr. "Stock Buyback and Corporate Cashouts," Jun. 11, 2018, *available at* [https://www.sec.gov/news/speech/speech-jackson-061118#\\_%20fn22](https://www.sec.gov/news/speech/speech-jackson-061118#_%20fn22).

<sup>8</sup> Chris Isidore, "Norfolk Southern is paying \$6.5 million to derailment victims. Meanwhile, it's shelling out \$7.5 billion for shareholders," CNN, February 22, 2023, *available at* <https://www.cnn.com/2023/02/22/investing/norfolk-southern-share-repurchases/index.html>.

<sup>9</sup> U.S. Senate Finance Committee, "Wyden Launches Investigation Of Abbot Tax, Stock Buyback Practices," May 18, 2022, *available at* <https://www.finance.senate.gov/chairmans-news/wyden-launches-investigation-of-abbott-tax-stock-buyback-practices>.

<sup>10</sup> The International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW), "New UAW Video Exposes Extreme CEO Pay at Big Three Compared to Rival Automakers, Shows Companies Can Easily Afford UAW Demands," Oct. 11, 2023, *available at* <https://uaw.org/new-uaw-video-exposes-extreme-ceo-pay-at-big-three-compared-to-rival-automakers-shows-companies-can-easily-afford-uaw-demands/>.

<sup>11</sup> Section 10201 of the Inflation Reduction Act of 2022, Pub. L. No. 117-169, 136 Stat. 1818 (2022).

<sup>12</sup> President Joseph R. Biden, State of the Union Address (Feb. 7, 2023).

issued guidance notifying applicants of CHIPS funds that they will be evaluated on their commitments to “[m]ake investments in the U.S. semiconductor industry, with corresponding commitments regarding stock buybacks.”<sup>13</sup> Meanwhile, members of Congress have introduced many relevant bills to address the current under-regulated state of share repurchases, including the Stock Buyback Accountability Act, the Advancing Long-Term Incentives for Governance Now (ALIGN) Act, the Reward Work Act, and the Accountable Capitalism Act. All these actions demonstrate a growing consensus that the status quo is untenable.

## **SEC Rule Proposal and Lawsuit**

It was in this context of deregulation, rampant and opaque use of share repurchases, and the resulting policy changes and escalating calls for action, that the SEC took action. Last May, the SEC adopted important share repurchase disclosure requirements that for the first time would allow it to enforce its very generous safe harbor and ensure investors have meaningful visibility into this widespread practice, including the trading activity of certain officers and directors within four business days before or after a share repurchase program announcement.<sup>14</sup> Even though this rule is the minimum needed for investor protection in the context of the under-regulated state of affairs created by the SEC itself in 1982, the Chamber of Commerce successfully sued to block it. However, the status quo is untenable for investor protection, fair, orderly, and efficient markets, and capital formation. The SEC must stand behind the need for investors to have basic transparency about share repurchases and move quickly to ensure that corporate special interests do not win by weaponizing a notoriously industry-aligned part of the judiciary.

We thank you for your attention to this matter. For further discussion, please contact Natalia Renta at [natalia@ourfinancialsecurity.org](mailto:natalia@ourfinancialsecurity.org).

Sincerely,

Americans for Financial Reform Education Fund

20/20 Vision

American Federation of Labor and Congress of Industrial Organizations (AFL-CIO)

American Federation of State, County and Municipal Employees (AFSCME)

American Federation of Teachers (AFT)

Better Markets

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<sup>13</sup> Department of Commerce, Funding Opportunity – Commercial Fabrication Facilities, “FACT SHEET: Protecting U.S. Taxpayers,” Feb. 28, 2023, *available at* [https://www.nist.gov/system/files/documents/2023/02/28/CHIPS\\_NOFO-1\\_Protecting\\_US\\_Taxpayers\\_Fact\\_Sheet\\_0.pdf](https://www.nist.gov/system/files/documents/2023/02/28/CHIPS_NOFO-1_Protecting_US_Taxpayers_Fact_Sheet_0.pdf).

<sup>14</sup> See SEC Fact Sheet: Share Repurchase Disclosure Modernization, *available at* <https://www.sec.gov/files/34-97424-fact-sheet.pdf>.

Communications Workers of America (CWA)  
Institute for Policy Studies/Global Economy Project  
Oxfam America  
People Power United  
Public Citizen  
United Food and Commercial Workers International Union (UFCW)  
United for Respect  
Utility Workers Union of America (UWUA)

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