Market Manipulation, Shareholder Heterogeneity and Stock Repurchases

Law Working Paper N° 904/2026
February 2026

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Yale University and ECGI

ECGI Working Paper Series in Law

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Corporations are significantly hindered in making repurchases by SEC Rule 10b-18, which considers all buybacks as involving potential market manipulation and artificially suppresses the prices that companies can pay for their shares in open market purchases. The main argument in this article is that, while passage of the Rule was an improvement on the prior regulatory regime which was characterized by massive uncertainty about the legality of literally every issuer repurchase program, the Rule is still far too restrictive on repurchases because it prohibits firms from repurchasing their shares at a premium over the bid or market price for the firm's shares. Despite the regulatory constraints on share repurchases, stock buybacks have surpassed dividend payments as the favored method for returning capital to shareholders, with a record $942.5 billion spent on repurchases in 2024. Stock buybacks are particularly important in tech companies like Apple, Microsoft, Alphabet (Google) and Meta Platforms (Facebook), which collectively repurchased over a trillion dollars of their own shares in the past three years. This Article defends buybacks against the accusation that they reflect market manipulation, argues that buybacks should not be regulated any differently than stock purchases by other fiduciaries, and, observing that the current regulations make it particularly difficult for all but the largest companies to make repurchases, recommends ending the restrictions on repurchases. Heterogeneous beliefs about a corporation's prospects results in a downward sloping demand curve for a corporation's shares. The shareholding population are the investors most optimistic about the firm's prospects. Many shareholders (i.e., those who are the most optimistic among the generally optimistic shareholding population) will prefer not to sell their shares absent a substantial premium. But since all shareholders are relatively optimistic about the company (or else they would not be shareholders) companies often cannot make repurchases without offering such a premium, which SEC Rule 10b-18 inhibits them from doing. Because of shareholder heterogeneity, unlike dividends, share repurchases at a premium can make both selling and not selling shareholders better off. Relatively less optimistic shareholders (or shareholders who require liquidity for exogenous reasons) will prefer to sell their shares at a slight premium, while more optimistic shareholders will retain their shares and benefit because repurchases increase their ownership share of the firm and their percentage share of future profit distributions.

Keywords: Stock Repurchases, SEC Rule 10b-18, agency costs

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Corporations are significantly hindered in making repurchases by SEC Rule 10b-18, which considers all buybacks as involving potential market manipulation and artificially suppresses the prices that companies can pay for their shares in open market purchases. The main argument in this article is that, while passage of the Rule was an improvement on the prior regulatory regime which was characterized by massive uncertainty about the legality of literally every issuer repurchase program, the Rule is still far too restrictive on repurchases because it prohibits firms from repurchasing their shares at a premium over the bid or market price for the firm's shares.

Despite the regulatory constraints on share repurchases, stock buybacks have surpassed dividend payments as the favored method for returning capital to shareholders, with a record $942.5 billion spent on repurchases in 2024. Stock buybacks are particularly important in tech companies like Apple, Microsoft, Alphabet (Google) and Meta Platforms (Facebook), which collectively repurchased over a trillion dollars of their own shares in the past three years. This Article defends buybacks against the accusation that they reflect market manipulation, argues that buybacks should not be regulated any differently than stock purchases by other fiduciaries, and, observing that the current regulations make it particularly difficult for all but the largest companies to make repurchases, recommends ending the restrictions on repurchases.

Heterogeneous beliefs about a corporation's prospects results in a downward sloping demand curve for a corporation's shares. The shareholding population are the investors most optimistic about the firm's prospects. Many shareholders (i.e., those who are the most optimistic among the generally optimistic shareholding population) will prefer not to sell their shares absent a substantial premium. But since all shareholders are relatively optimistic about the company (or else they would not be shareholders) companies often cannot make repurchases without offering such a premium, which SEC Rule 10b-18 inhibits them from doing.

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INTRODUCTION

Despite significant regulatory constraints and loud criticism from politicians,[1] stock repurchases play a central role in corporate governance by aligning managerial behavior with the interests of stockholders.[2] Properly functioning corporate governance mechanisms constrain managerial discretion and reduce opportunities for value-destroying actions such as overinvestment, self-dealing, empire building, and inefficient use of free cash flow.[3] Stock repurchases discipline corporate managers by forcing them to operate with a smaller cash cushion, reducing the risk that managers will engage in empire building or otherwise invest inefficiently in negative present value projects.[4]

The principal corporate governance mechanisms that work to align the interests of shareholders and managers are monitoring and oversight by boards of directors;[5] incentive compensation plans,

[1] Stock repurchases (buybacks) face intense scrutiny from U.S. politicians, particularly progressives, who argue they prioritize executive compensation and shareholder payouts over worker wages, research, and capital investment. In response, Congress implemented a 1% excise tax on buybacks via the Inflation Reduction Act of 2022, with proposals to increase this to 4%. Beyond the excise tax, the SEC has proposed stricter, more frequent reporting requirements for repurchases. Critics, including politicians like Bernie Sanders and Elizabeth Warren, argue that buybacks are a form of stock manipulation that hinder long-term corporate health. For example, the Biden administration criticized defense contractors for utilizing buybacks rather than increasing production. *See* Kose John, Subramanian R. Iyer & Ramesh P. Rao, *Is Regulation of Share Repurchases Justified?*, COLUMBIA L. SCH. BLUE SKY BLOG (Oct. 14, 2024), https://clsbluesky.law.columbia.edu/2024/10/14/is-regulation-of-share-repurchases-justified/ ("Politicians have been at the forefront of opposition to" share repurchases).

[2] Richard A. Booth, *The Mechanics of Share Repurchases or How I Stopped Worrying and Learned to Love Stock Buybacks*, 28 Stan. J.L. Bus. & Fin. 1, 42, 74 (2023) (repurchases "are part of an elaborate and well-oiled system for the recirculation of capital" to investors).

[3] *See generally* Eugene F. Fama & Michael C. Jensen, *Separation of Ownership and Control*, 26 J.L. & Econ. 301 (1983); Benjamin E. Hermalin & Michael S. Weisbach, *Endogenously Chosen Boards of Directors and Their Monitoring of the CEO*, 29 RAND J. Econ. 327 (1998).

[4] Michael C. Jensen, *Agency Costs of Free Cash Flow, Corporate Finance, and Takeovers*, 76 AM. ECON. REV. 323 (1986).

[5] Independent directors monitor management, approve major decisions, evaluate performance and, when necessary, replace underperforming executives. *See* Benjamin E. Hermalin & Michael S. Weisbach, *Endogenously Chosen Boards of Directors and Their Monitoring of the CEO*, 29 RAND J. Econ. 327 (1998); Benjamin Hermalin, & Michael Weisbach, *Boards of Directors as an Endogenously Determined Institution: A Survey of the Economic Literature*. 9 ECON. POL'Y REV. 7, 26 (2003) ("Boards of directors are an integral part of the governance of large organizations…").

particularly stock options, restricted stock, or performance-based bonuses;[6] the market for corporate control;[7] shareholder activism;[8] legal rules protecting investors' rights that are actually enforced;[9] disclosure, auditing and transparency;[10] and capital structure.[11]

Share repurchases, which are the focus of the Article, are an increasingly important component of corporate governance. This Article makes several arguments about share repurchases. I argue that, despite the fact that share repurchases and dividends are both distributions of cash to shareholders and each has exactly the same effect on the balance sheet of the company making the distributions, share repurchases are superior to dividend payments in important ways, particularly in light of the heterogeneous views of shareholders about a corporation's future prospects.[12]

Specifically, I first establish the fundamental point that shareholders are generally more optimistic about the prospects of the

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[6] Executive compensation can reduce agency costs by giving managers "skin in the game." John E. Core, Wayne R. Guay & David F. Larcker, *Executive Equity Compensation and Incentives*, 9 ECON. POL'Y REV. 27 (2003); Michael C. Jensen & Kevin J. Murphy, *Performance Pay and Top-Management Incentives*, 98 J. POL. ECON. 225 (1990).

[7] The possibility of a hostile takeovers discipline managers by threatening replacement if they fail to maximize value. Michael C. Jensen, *Agency Costs of Free Cash Flow, Corporate Finance, and Takeovers*, 76 AM. ECON. REV. 323 (1986); Michael C. Jensen & Richard S. Ruback, *The Market for Corporate Control: The Scientific Evidence*, 11 J. FIN. ECON. 5 (1983).

[8] Shareholders—especially institutional investors such as activist hedge funds—apply pressure to management for accountability, improved capital allocation, and better governance. Andrei Shleifer & Robert W. Vishny, *Large Shareholders and Corporate Control*, 94 J. POL. ECON. 461 (1986); Stuart L. Gillan & Laura T. Starks, *Corporate Governance Proposals and Shareholder Activism: The Role of Institutional Investors*, 57 J. FIN. ECON. 275 (2000).

[9] Rafael La Porta, Florencio Lopez-de-Silanes, Andrei Shleifer & Robert W. Vishny, *Law and Finance*, 106 J. POL. ECON. 1113 (1998); John C. Coffee, Jr., *The Future as History: The Prospects for Global Convergence in Corporate Governance*, 93 NW. U. L. REV. 641 (1999).

[10] Robert M. Bushman & Abbie J. Smith, *Financial Accounting Information and Corporate Governance*, 32 J. ACCT. & ECON. 237 (2001); Ray Ball, Ashok Robin & Joanna S. Wu, *Incentives versus Standards: Properties of Accounting Income in Four East Asian Countries*, 41 J. ACCT. & ECON. 1 (2003).

[11] Frank H. Easterbrook, *Two Agency-Cost Explanations of Dividends*, 74 AM. ECON. REV. 650 (1984); Jensen, *supra* note 4, at 324.

[12] For an excellent analysis of a firm's choice between dividends and stock repurchases in an environment of heterogeneous beliefs among equity market investors and short sale constraints, see Onur Bayar, Thomas J. Chemmanur & Mark H. Liu, *Dividends versus Stock Repurchases and Long-Run Stock Returns under Heterogeneous Beliefs*, 10 REV. FIN. STUD. 578, 616 (2021). https://ssrn.com/abstract=2287322.

companies in which they own shares than the investing population at large. This is a straightforward implication of the fact that the demand curve for stock slopes downward due to the heterogeneous views of buyers and sellers about the company's future prospects and different beliefs about the likely performance of the company in comparison with its competitors. Corporate stock is sold in auction-type markets, and the winners of these auctions are the investors who are the most optimistic about the company's prospects.

The downward slope of the demand curve for a company's shares is due to the simple fact that investors have differing estimates of the expected returns from the stock, but even the least optimistic shareholders are more optimistic than non-shareholders. At the extreme, of course are non-shareholders who have taken short positions in the firm, believing that the current shareholders overvalue the firm's shares.

As the price of a company's stock increases, fewer investors are willing to hold it. Only those investors with the highest evaluations of the stock's return are willing to buy or hold at higher prices. As the price of a company's stock decreases, more investors find the stock attractive and are willing to purchase it, reflecting the existence of a downward-sloping demand curve.[13]

In this Article, I argue that the relative optimism of shareholders has implications for SEC Rule 10b-18 which effectively prevents companies from repurchasing their shares at any price higher than the highest independent bid or the last independent reported trade price.[14] Here I make two points. First, the current regulations are a particular problem for relatively small public companies, whose shares trade with less liquidity. For all but the largest companies, low trading volume means that even relatively small stock purchase can exert significant upward price pressure on the company's stock price, making it difficult to comply with Rule 10b-18's condition that corporate share repurchases be made at a price that is not higher than the last trade price. This rule essentially requires companies making share repurchases to "chase their own tails" because their own purchases drive the price up, making it difficult for them to make additional purchases while remaining in compliance with the rule. As such, it is not surprising that the very largest companies account for most of the share repurchases in the United States.[15]

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[13] Edward M. Miller, *Risk, Uncertainty, and Divergence of Opinion*, 32 J. FIN. 1151, 1159 (1977).

[14] 17 C.F.R. § 240.10b-18 (2018).

[15] Press Release, S&P Global, S&P 500 Q3 2025 Buybacks Post Modest 6.2% Gain to $249.0 Billion After Declining 20.1% Amidst Uncertainty in Q2; Q4 2025 Expenditures Expected to Post Similar Growth, As 2025 Anticipates a Record $1 Trillion, Corporate News (Dec. 18, 2025), https://www.spglobal.com/spdji/en/corporate-news/article/sp-500-q3-

Second, I point out that, by definition, share repurchases are directed at a corporation's current population of shareholders. If these shareholders wanted to sell their shares at the current bid price for the stock, then they would do so without any need for the issuer to effectuate a repurchase. As such, limiting repurchases to the last independent bid price necessarily reduces companies' ability to repurchase their shares to situations in which shares are repurchased from large block holders who cannot obtain market prices for their entire blocks of stock, or to environments in which share prices are on the rise.

Even within any population of shareholders of a company (all of whom are relatively optimistic about the prospects of the companies in which they have invested) as Bayar, Chemmanur and Liu have observed in an important article, some shareholders are more optimistic than others. As they explain the phenomenon: "[o]utside equity holders in the firm have heterogeneous beliefs about the probability of success of the firm's project and therefore its long-run prospects."[16] Some shareholders inevitably will be more optimistic than others and believe that the company's shares are worth significantly more than the price at which they are trading, while others believe that the stock is worth about what the market indicates, or perhaps just a little bit more.

Thus, public company shareholders are both optimistic and heterogeneous in the degree of their optimism. Differences in levels of optimism about the future prospects of the firm are not the only explanation for why some shareholders might prefer to have their shares repurchased while others would prefer not to participate in such a repurchase.

For example, at any particular point in time, some shareholders may prefer not to receive cash payments for tax or other reasons, while others may be at a juncture in their life cycle at which they prefer consumption over investment because they have significant medical or education expenses. Other shareholders may wish to sell to effectuate portfolio re-balancing or because they have clients or customers who require cash payments, or because they have become pessimistic about macroeconomic conditions. Unlike dividend payments, share repurchases can make both selling and non-selling shareholders better off.

Similarly, when some shareholders are more optimistic than others, repurchases allow less-optimistic selling shareholders to exit from the company at what they perceive to be a premium price, thereby

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2025-buybacks-post-modest-62-gain-to-249-0-billion-after-declining-20-1-amidst-uncertainty-in-q2/.

[16] Bayar, Chemmanur & Liu, *supra* note 12, at 581.

generating a surplus for that shareholder cohort.[17] Repurchases simultaneously benefit non-selling shareholders by increasing their ownership stake in the company. This benefits them by entitling them to a larger share of future payouts and capital gains that their high degree of optimism leads them to expect the company to experience in the future. Thus, repurchases are accretive to the (optimistic) non-selling shareholders due to the relatively high value they assign to the company's shares.

Thus, the phenomenon of shareholder heterogeneity indicates that repurchases should be favored over dividend payments as a policy matter. Repurchases benefit the most optimistic shareholders, who do not sell into share repurchase opportunities. These shareholders view the repurchase price, even if it is higher than the market price, to still be lower than their own private valuation of the shares. Repurchases from others benefit the optimistic non-sellers by increasing their ownership interest in the firm. On the other hand, relatively less optimistic shareholders, who view the company's shares as worth less than the repurchase price, benefit by selling their shares at a premium. Regulations like SEC Rule 10b-18, by discouraging such repurchases, should be reconsidered.

Thus, as developed here, share repurchases, unlike dividend payments, are accretive to non-selling shareholders. Repurchases increase their percentage ownership in the company, giving them a larger share of the corporate pie. At the same time, selling shareholders are able to liquidate their investments at a premium. In contrast, dividend payments return money to all shareholders, regardless of the tax consequences, regardless of what options for reinvesting the money are available to them, and regardless of where they are at a point in their lives when they prefer consumption over investment.

Another advantage of share repurchases over dividends is that when a company repurchases its stock in blocks, such repurchases provide an exit ramp for institutional investors who have accumulated large blocks of stock that are difficult to sell at a competitive price due to the negative price impact that unloading large blocks usually has on stock prices. In particular, large sales often signal to other investors that an insider, sophisticated institution, or major holder is losing confidence in the company. Because the company effectuating a share repurchase has access to the best information about the company's performance, share repurchases can counteract the negative market perception usually associated with large block sales by sophisticated institutions.

It is important to take account of the benefits of share repurchases as well as the differences between share repurchases and dividend payments when analyzing SEC Rule 10b-18, which is the principal

[17] *Id.* at 594.

regulation governing corporations' stock repurchases.[18] Prior to the implementation of Rule 10b-18, corporations' purchases of their own shares were risky because they exposed repurchasing companies to SEC enforcement actions for engaging in market manipulation. Rule 10b-18 was implemented in 1982 to provide a safe harbor for issuers against charges of market manipulation when repurchasing shares.

Unfortunately, the fear that corporations will attempt to manipulate their share price by making repurchases permeates Rule 10b-18. Thus, while the Rule ostensibly provided a safe harbor that provides a regulatory framework for enabling share repurchases, the rule creates burdens on such repurchases that should be eliminated. The primary mechanism deployed in Rule 10b-18 to prevent price manipulation by issuers are price ceilings: the rule requires firms to buy their shares at prices that do not exceed the highest independent bids or the last transaction prices on public markets.

Such rules are intended to disable repurchasers from affecting their companies' stock prices. As explained here, this goal is misguided. Share repurchases often convey valuable information, both good and bad, about the repurchaser. Where this is the case, then the company's share price should adjust to reflect such information. Regulation should not discourage this benign market phenomenon.

While Rule 10b-18 is intended to prevent firms from inflating their share prices by outbidding other traders, it unduly constrains share repurchases and should be relaxed, or better still, abandoned altogether. At a minimum, an extant proposal made in 2018 by Brad Katsuyama's IEX Stock Exchange and never acted upon, which would amend Rule 10b-18 to allow issuers to execute share repurchases at the midpoint of the National Best Bid and Offer (NBBO),[19] should be adopted.[20]

In addition, I argue that companies making share repurchases should be exempt from certain other trading rules, such as the trade-through rule. The trade-through rule makes it more difficult for issuers to effectuate share repurchases away from exchanges on alternative trading

[18] 17 C.F.R. § 240.10b-18 (2023).

[19] The NBBO is essentially an aggregation of the public bids and offering prices for securities that are consolidated and displayed for traders and other market participants. More technically, the NBBO is the best bid and best offer for a publicly traded security as calculated and disseminated by one of the two Security Information Processors (SIPs) (Consolidated Quote System (CQS)) and UTP Quotation Data Feed (UQD)) that are approved by the SEC to aggregate and disseminate quotations for the purchase and sale of securities. C.F.R. § 600(b)(42).

[20] Letter from John Ramsay, Chief Market Policy Officer, Inv. Exch. LLC (IEX), to Brent J. Fields, Secretary, SEC (Mar. 27, 2018), https://www.sec.gov/files/rules/petitions/2018/petn4-722.pdf.

venues, such as dark pools, because it requires trades to occur at prices above the current best market price. That requirement conflicts with SEC Rule 10b-18's mandate that repurchases be at or below the current bid price.[21]

In sum, I argue that dividends and share repurchases both play a valuable role in corporate governance, but that share repurchases are the superior vehicle for returning money to shareholders, even in the absence of tax advantages. If the artificial regulatory restraints imposed on share repurchases were removed, then share repurchases likely would replace dividend payments entirely.

Part I of this Article describes the importance of share repurchases in corporate governance, explains the similarities and differences between share repurchases and dividend payments and discusses the mechanics of share repurchases. Part II discusses the problem of stock market manipulation and explains that stock prices are subject to manipulation by purchasers and sellers in a variety of ways, but that share repurchases are not inherently manipulative and do not impose a greater risk of market manipulation than a variety of other forms of stock trading, such as trading by insiders.

In Part III, I describe the important positive role that repurchases play in corporate governance and explain why share repurchases are a superior device for returning money to shareholders than dividend payments. Here, I provide my core argument by showing that share repurchases make both selling and non-selling shareholders better off in ways that dividend payments cannot in light of the optimism and heterogeneity of shareholders.

In Part IV of the Article, I describe the regulatory impediment to share repurchases imposed by SEC Rule 10b-18 and advocate for the repeal of this rule in order to make it easier for companies to repurchase their shares. In Part V, I describe, analyze, and refute the criticisms that have been leveled against share repurchases. Generally, these criticisms fall into three categories. Some criticize share repurchases for allegedly causing harm to society. Some criticize share repurchases for harming the companies who engage in stock repurchases. Finally, a third group criticizes buybacks as involving abusive market manipulation of the issuer's stock.

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[21] Xiongshi Li, Mao Ye & Miles Zheng, *Price Ceilings, Market Structure, and Payout Policies*, 155 J. FIN. ECON. 103818, 8-11 (2024), https://doi.org/10.1016/j.jfineco.2024.103818.

I. Repurchases vs. Dividends: The Rise of Stock Buybacks

Once an illegal form of market manipulation,[22] stock buybacks have replaced hostile takeovers as the central feature of modern corporate finance. The numbers are simply staggering, led by the $100 billion buyback reported by Apple for the 12-month period ending June 2025, up from its buyback in the prior 12-month period of $96.3 billion.[23] Buybacks in 2025 by U.S. public companies already had passed the $1 trillion mark by August.[24] Goldman Sachs' $40 billion buyback translated into a repurchase by the company of over 18 percent of its outstanding equity, as measured by market capitalization. Wells Fargo bought 15.5 percent of its shares in buybacks in 2025 alone.[25]

In some ways, this is nothing new. Share repurchases overtook dividend payments as the primary mechanism for returning cash to shareholders 20 years ago, not long after the Securities and Exchange Commission (SEC) determined that companies' repurchases of their own stock did not necessarily involve market manipulation.[26] Predictably, share repurchases have had a significant impact on dividend payments. When dividend payments were the dominant vehicle for returning cash to shareholders, the broad US stock market's dividend yield ranged between 3% and 6%. It is now well below 2%.[27]

While share repurchases are growing among companies in the European Union (EU), share repurchases are viewed with much greater suspicion there than in the U.S. In the U.S., there are no restrictions on

[22] Share repurchases were legalized with the enactment of Rule 10b-18 by the U.S. Securities & Exchange Commission (SEC) in 1982. which provided a "safe harbor" for repurchases. 17 CFR §240.10b-18. Prior to that, open market share repurchases were judged to be a form of market manipulation due to their ability to increase stock price and were deemed to be illegal.

[23] Press Release, S&P Global, S&P 500 Q2 2025 Buybacks Declines 20% Amidst Uncertainty to $235 Billion From Q1 2025's Record $293 Billion; Q3 2025 Expenditures Expected to Increase Back to Near Record Levels (Sept. 17, 2025), https://press.spglobal.com/2025-09-17-S-P-500-Q2-2025-Buybacks-Declines-20-Amidst-Uncertainty-to-235-Billion-From-Q1-2025s-Record-293-Billion-Q3-2025-Expenditures-Expected-to-Increase-Back-to-Near-Record-Levels.

[24] Dorothy Neufeld, *Visualizing the Biggest Stock Buybacks of 2025*, VISUAL CAPITALIST (Sept. 9, 2025), https://www.visualcapitalist.com/biggest-stock-buybacks-of-2025/

[25] *Id.*

[26] Dan Lefkovitz, *Stock Buybacks Are Booming in 2025. That's Bad News for Dividend Investors*, MORNINGSTAR INDEXES (Oct. 8, 2025), https://indexes.morningstar.com/insights/perspective/bltb5182b9245a7714d/stock-buybacks-are-booming-in-2025-thats-bad-news-for-dividend-investors

[27] *Id.*

the timing, price or volume of share repurchases,[28] and there are no special rules for share repurchases that do not also apply to dividend repayments. No shareholder vote is required in the U.S. in order for a company to make a share repurchase. In contrast, in the EU, share repurchases require shareholder approval and such approval is valid for only 18 months. In addition, repurchases are restricted to 15% of a company's outstanding stock, and repurchases can only be paid from distributable profits.[29] Restrictions also apply to share repurchases in the United Kingdom, including the requirement for a shareholder vote. In addition, in the UK, companies must file a Form SH03 with Companies House, the UK government agency responsible for incorporating limited liability companies, and for keeping a public register of company information.[30]

Despite various regulatory impediments, share repurchases are a growing phenomenon in the EU and elsewhere outside of the U.S., although share repurchases remain a more prominent feature of the corporate finance landscape in the U.S. than elsewhere.[31] In contrast to Europe, regulatory impediments to share buybacks are decreasing in Asia. Japan, South Korea and China have relaxed regulatory restrictions on share repurchases.[32]

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[28] An exception is that, under U.S. state corporate law, corporations cannot make share repurchases if the repurchase would render them insolvent.

[29] Abdul A. Rasheed, Jenny Gu & Greg Bell, Stock Repurchases: Antecedents, Outcome, and Implications, Oxford Research Encyclopedias: Business and Management (Aug. 21, 2024), https://doi.org/10.1093/acrefore/9780190224851.013.428.

[30] Ana-Maria Badeanu, *Share Buybacks – Frequently Asked Questions*, Latest News, Grant Saw Solicitors LLP (July 7, 2025), https://grantsaw.com/share-buybacks-frequently-asked-questions#:~:text=Shareholders%20usually%20approve%20a%20buyback,a%20buyback%2C%20the%20company%20must%3A.

[31] Manishi Raychaudhuri, *Can Asian Corporates Newfound Love of Buybacks Continue?,* REUTERS, Sept. 3, 2025, https://www.reuters.com/markets/asia/can-asian-corporates-newfound-love-buybacks-last-2025-09-03/ ("Asian companies have bought back shares worth around $266 billion in the first eight months of 2025, almost 70% more than they did in all of 2024."). Harry Goodacre, *2023 Share Buybacks: Activity Continues to Rise Outside of The US*, SHRODERS (Feb. 12, 2024), https://www.schroders.com/en-us/us/institutional/insights/2023-share-buybacks-activity-continues-to-rise-outside-of-the-us/; Junichi Inoue, *Chart to Watch: Will Japanese share Buybacks Surpass The Record High In 2024*?, JANUS HENDERSON INVESTORS (July 15, 2025), https://www.janushenderson.com/corporate/article/chart-to-watch-will-japanese-share-buybacks-surpass-the-record-high-in-2024/ ("Share buybacks have been rising year after year, signaling a strong commitment to returning capital to shareholders and optimising balance sheets.").

[32] Amay Hattangadi & Jerry Peng, *China Inc.: A Changing Mindset*, Morgan Stanley Inv. Mgmt. (Mar. 2025); Raychaudhuri, *supra* note 31 ("Regulatory support in Japan, South Korea and China has played a significant role in the

A. How are Share Repurchases Different from Dividends?

A dividend payment is a pro rata distribution of a portion of a corporation's equity to its shareholders.[33] When a company makes a dividend payment, every shareholder receives a payment in proportion to the number of shares they own. Like dividend payments, share repurchases distribute a portion of a company's equity to shareholders. Unlike dividend payments, however, share repurchases are not pro rata.

Viewed from the perspective of the corporation, the effects of paying a dividend and the effect of repurchasing shares are identical. Both dividend payments and repurchases reduce the assets of the company paying the dividend by the amount paid to shareholders in making the dividend payment or the share repurchase. To the extent that a corporation borrows money to make a dividend payment or to repurchase its shares, the dividend or share repurchase results in an increase in the amount of the liabilities shown on the company's balance sheet. Finally, both dividend payments and share repurchases reduce the amount of equity on the balance sheet to reflect the reduction in the company's assets and/or the increase in the company's debt.

While dividend payments and share repurchases are identical in terms of their effect on the balance sheet of the corporation effectuating the dividend payment or the share repurchase, they are quite different when viewed from the perspective of the shareholders on the receiving end of such payments. First, when a company makes a dividend payment, every shareholder receives a payment, but when a company makes a share repurchase, only the shareholders who choose to sell their shares back to the company receive the payment.

Second, when a company pays a dividend, the company's stock price generally drops by the amount of the dividend on the first day that the stock trades after the dividend payment date.[34] In contrast, share

trend toward more shareholder-friendly policies, including the increased use of buybacks. Japan was the first of the three to implement policies … with efforts initially announced in March 2023, Beijing followed suit in December 2023, when the China Securities Regulatory Commission (CSRC) relaxed rules for share buybacks by listed companies. In March 2024, the CSRC doubled down with policies encouraging, companies to put in place buyback plans in response to short-term share price volatility.").

[33] While dividend payments can take the form of in-kind distributions of assets other than cash, dividends typically are paid in cash and the analysis in this Article is focused on cash dividends.

[34] When a company declares a dividend, the dividend payment is made to all shareholders who own the stock as of a certain date. Shareholders who bought shares before the dividend date receive a dividend. Those who purchase shares after that date, which is known as the ex-dividend date, do not

repurchases, by reducing the number of outstanding shares, often result in the remaining shares becoming more valuable. Moreover, news that a corporation is repurchasing its shares often signals that management believes the company's stock price to be undervalued in the market, which frequently triggers a positive stock price reaction. On the other hand, sometimes a stock buyback sends the negative signal that the company lacks profitable ideas or opportunities to invest cash that is not immediately needed to fund the company's ongoing operations.

Next, when a company pays a dividend, each shareholder's interest in the company remains the same. In contrast, in a share repurchase, the percentage ownership of the shareholders who do not sell their shares experience an increase in their percentage of the company (and of course, selling shareholders experience a decrease in their percentage of the company).

Finally, dividends and share repurchases have different tax implications for stockholders. When a dividend is paid, a taxpaying stockholder is taxed the full amount of the dividend at their individual income tax rate.[35] When a share repurchase is made, the investor pays taxes only on the portion of the funds received that represent a capital gain for the shareholder. This means that share repurchases often are advantageous for shareholders, particularly when shares are received in a bequest, due to the step-up in basis rules.

Due to concerns about stock buybacks discussed below, in 2022 the Inflation Reduction Act imposed a 1% excise tax on stock buybacks by publicly traded corporations. This tax does not apply to companies paying dividends. The excise tax is non-deductible for companies.[36] The

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receive the declared dividend. On the ex-dividend date, share prices decline to reflect the fact that shares purchased on and after that date will not be receiving the declared dividend. *See* Phil Mackintosh & Robert Jankiewicz, *All About Ex-Dividend Dates*, NASDAQ (Oct. 2, 2025, 5:45 PM), https://www.nasdaq.com/articles/all-about-ex-dividend-dates.

[35] Caroline Osborn, *How the U.S. Taxes Stock Buybacks and Dividends*, Bipartisan Pol'y Ctr. (July 23, 2024), https://bipartisanpolicy.org/explainer/how-the-u-s-taxes-stock-buybacks-and-dividends/ ("Individuals generally pay between zero and 23.8% tax on dividends depending on their income tax bracket. High-income earners may also be subject to an additional 3.8% net investment income tax. Under current law, the tax rates for qualified dividends are the same as the long-term capital gains tax rate, although this has not always been the case; from 1985 to 2003, dividends were taxed at the same rate as regular income.").

[36] *Id.* The tax can be reduced by new issues to the public or stock issued to employees and does not apply to buybacks valued at less than $1 million or contributed to employee retirement plans.

Joint Committee on Taxation estimated that the 1% tax would raise $74 billion over the FY2022-FY2031 period.[37]

B. The Mechanics of Share Repurchases

When public companies repurchase their shares, they effectuate the repurchases in a variety of ways, with the most common being open market purchases. Other methods of making share repurchases include tender offers (either in the form of a fixed price offer or a Dutch auction), private directly negotiated purchases, and Accelerated Share Repurchases (ASRs).

i. Open Market Purchases

When repurchasing its shares on the open market, the company simply buys back its shares directly from the market, executing the purchases through designated stockbrokers.[38] The buyback of shares generally happens over an extended period of time in order to purchase a large number of shares without significantly impacting the company's stock price.[39]

An advantage of effectuating a stock buyback through open market purchases is that, unlike other methods, stock buybacks do not impose any legal obligations on the repurchasing company to complete the buyback program.[40] This gives the company the freedom and flexibility to amend or cancel the stock buyback program at any time. Another advantage of open market stock buybacks is that it allows the company to repurchase its shares at close to the current market price and obviates the need to pay a premium for the shares.[41]

ii. Tender Offers

A tender offer is a public proposal by a public company bidder,[42] which is open for a fixed period of time, to buy a certain number of the

[37] Jane Greville, *The 1% Excise Tax on Stock Repurchases (Buybacks)*, Congressional Research Service, CRS Product No. R47397, Feb. 14, 2023, https://www.congress.gov/crs-product/R47397#:~:text=The%20law%20commonly%20known%20as,increase%20the%20rate%20to%204%25.

[38] CFI, *Stock Buyback Methods*, https://corporatefinanceinstitute.com/resources/management/stock-buyback-methods/ (last visited Dec. 19, 2025).

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] In this context, of course, the bidder is the company making the share repurchase, and the transaction sometimes is referred to as a "self-tender" or "issuer self-tender."

shares of the target at a specified price. The price of the tender offer almost always includes a premium relative to the current share price because a premium over market must be paid in order for the tender offeror/repurchasing company to succeed in repurchasing the number of shares it hopes to repurchase.[43]

Shareholders who are interested in selling their stocks submit their number of shares for sale to the company. If more shares are tendered for sale than the company wishes to repurchase, each shareholder who tenders will sell their shares on a pro rata basis. Generally, a fixed price tender offer can allow for a completion to buyback a significant number of shares within a relatively short period of time.

Alternatively, in a tender offer structure as a Dutch auction, a company makes a tender offer to the shareholders to buy back shares and provides a range of possible prices, setting the minimum price of the range above the current market price. The shareholders then specify the number of shares they are willing to sell and the lowest price at which they are willing to sell those shares. The company conducting the repurchase by Dutch auction will review the offers received from its shareholders and determine the lowest price at which it can purchase the number of shares it intends to repurchase. The company then pays that price to all of the tendering shareholders.[44]

Self-tender offers are extensively regulated. SEC Rule 13e-4 establishes comprehensive requirements for issuer self-tender offers, imposes disclosure obligations, timing requirements, and a variety of procedural protections for shareholders of companies that engage in self-tender offers. Rule 13e-4 requires issuers to file Schedule TO with the SEC as soon as practicable on the commencement date, along with all written communications relating to the offer.[45] Issuers must disclose the

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[43] CFI, *Stock Buyback Methods*, *supra* note 38.

[44] Walleye Trading LLC v. AbbVie Inc., No. 18 C 05114, 2019 WL 4464392, at footnote 1 (N.D. Ill. Sept. 18, 1991), *aff'd*, 962 F.3d 975 (7th Cir. 2020). ("In a Dutch Auction, a company sets a range of prices at which it is willing to repurchase a fixed dollar amount of stock from its stockholders. Willing stockholders then choose a price within the specified range at which they would sell. The company then calculates a purchase price for the stock based on the lowest price it must spend per share such that its total expenditure is the previously specified, fixed amount. For example, AbbVie set its purchase price at the lowest price for which it could buy back an aggregate $7.5 billion worth of stock. All shareholders who tendered at or below the purchase price would receive the purchase price, subject to potential proration. If the price was set at $99, AbbVie could buy back up to 75.8 million of the Company's shares (4.8% of shares outstanding); if at $114, AbbVie could buy back up to 65.8 million shares (4.1% of shares outstanding.").

[45] 17 CFR § 240.13e-4.

information required by Schedule TO to security holders, including a summary term sheet and detailed offer information.[46]

The rules require that tender offers remain open for at least twenty business days from commencement, with an additional ten business days required if the issuer increases or decreases the percentage of securities sought or the consideration offered.[47] Shareholders have broad withdrawal rights, allowing them to withdraw tendered securities at any time during the offer period and, if not yet accepted for payment, after forty business days from commencement.[48]

Among the procedural protections for shareholders is an equal treatment requirement that requires that the offer be made open to all security holders of the class and that all shareholders tendering during the period when the tender offer is open receive the highest consideration paid to any holder.[49] When offers are oversubscribed, acceptance must be on a pro rata basis, though small holders owning fewer than 100 shares may be accepted in full before proration.[50] The rule also prohibits post-offer purchases of the same securities for at least ten business days after termination, preventing issuers from circumventing the tender offer process through subsequent market purchases.[51]

iii. *Privately Negotiated Share Repurchases*

In a privately negotiated stock repurchase the company directly approaches one or more holders of significant blocks of stock and offers to repurchases some or all of those shares. Under certain conditions, these direct negotiations with shareholders can allow the issuer to repurchase its shares at a lower price than would be possible in a tender offer or in open market purchases.

iv. Accelerated Share Repurchases

In an Accelerated Share Repurchase (ASR), the issuer purchases shares from an investment bank. Investment banks selling in ASRs often borrow the shares from other investors and repurchase the shares on the market to repay those lenders. For example, in 2020, Intel Corporation announced that it was repurchasing $10 billion of its common stock in an ASR program as part of a $20 billion repurchase program announced the previous year.[52] The company disclosed that it was:

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46 *Id.*
47 *Id.*
48 *Id.*
49 *Id.*
50 *Id.*
51 *Id.*
52 Press Release, Intel Corp., Intel Initiates $10 Billion Accelerated Share

> funding the share repurchases under the ASR agreements with existing cash resources. Strong operating results in the first half of 2020 have contributed to a healthy liquidity balance, which gives Intel the ability to invest in the business during a period of economic uncertainty while also returning capital to stockholders through dividends and these share repurchases.[53]

In a repurchase structured as an ASR, the public company pays its investment bank an amount estimated to be sufficient to effectuate the repurchase, and the bank delivers to the company the majority of the shares that the company wants to repurchase, with the balance to be delivered at the conclusion of the ASR. The investment bank obtains the shares delivered at the outset of the ASR from lenders in the stock-loan market.

The price that the company pays for its shares is typically the average of the daily volume-weighted average prices (VWAP) during the period the investment bank is the buying the shares, adjusted to an agreed-upon discount. If the company's share price goes up significantly during the term of the ASR, the initial payment made by the company for the repurchase may prove to be insufficient to cover the price of the initially delivered shares. When this happens, the company will be required to return value (in shares or cash) to its investment bank.[54]

As attorneys involved in structuring ASRs have explained, an ASR enables a public company that is repurchasing its shares to receive a large upfront delivery of shares.[55] An ASR also provides companies with certainty that the per- share repurchase price will be a discount to expected cost of the repurchase under Rule 10b-18.[56] The discount

Repurchase Agreements (Aug. 19, 2020), https://download.intel.com/newsroom/archive/2025/en-us-2020-08-19-intel-initiates-10-billion-accelerated-share-repurchase-agreements.pdf

53 *Id.*

54 David Goldschmidt, Mike Zeidel, Laura Kaufmann Belkhayat, Yossi Vebman & Sebastian Sanchez Rivera, *Skadden on Revisiting Share Repurchases in Volatile Times*, COLUMBIA L. SCH. BLUE SKY BLOG (Apr. 12, 2022), https://clsbluesky.law.columbia.edu/2022/04/12/skadden-on-revisiting-share-repurchases-in-volatile-times/.

55 Andrew J. Pitts, Daniel Haaren & Steven Seltzer, *Structuring Share Repurchases Under Rules 10b-18 and 10b5-1*, HARVARD L. SCH. FOR. ON CORP. GOVERNANCE (Aug. 14, 2025), https://corpgov.law.harvard.edu/2025/08/14/structuring-share-repurchases-under-rules-10b-18-and-10b5-1/#9b.

56 *Id.* ASRs do not qualify for the Rule 10b-18 safe harbor. *Id.*

represents the payment an investment bank makes to the public company for what is an essentially an option to sell "put" shares to the company at a pre-arranged price.[57] The option has value to the extent that the issuer's stock can be purchased at prices below the price negotiated with the issuer, and the option is not very risky in light of the contractual protection that the investment bank typically negotiates to receive stock or cash if the issuer's share price goes up during the term of the ASR.

II. Market Manipulation: Are Issuer Repurchases a Special Threat to Market Integrity?

A. The Problem of Market Manipulation

While the problem of insider trading garners most of the headlines, it was actually concerns about market manipulation rather than insider trading that provided the major impetus for the enactment of the Securities Act of 1933 and the Securities Exchange Act of 1934.[58] The Securities Exchange Act of 1934 blamed manipulation, along with "sudden and unreasonable fluctuations of securities prices and … excessive speculation on such exchanges and markets" for precipitating, intensifying and prolonging "[n]ational emergencies, which produce widespread unemployment and dislocation of trade, transportation and industry, and which burden interstate commerce and adversely affect the general welfare…"[59]

Despite the intense concern with manipulation, no definition of the term has ever been achieved.[60] As Professor Louis Loss observed in his seminal treatise, the term "has never had any precise meaning…"[61] Lacking any clear conception of what manipulation is, it is not surprising

[57] *Id.*

[58] Daniel R. Fischel & David J Ross, *Should the Law Prohibit 'Manipulation' in Financial Markets?* 105 HARV. L. REV. 503, 503 (1991) ("Much of the regulation of financial markets seeks to prevent manipulation.").

[59] 15 U.S.C. § 78b(4) (1988) ("National emergencies, which produce widespread unemployment and the dislocation of trade, transportation, and industry, and which burden interstate commerce and adversely affect the general welfare, are precipitated, intensified, and prolonged by manipulation and sudden and unreasonable fluctuations of security prices and by excessive speculation on such exchanges and markets, and to meet such emergencies the Federal Government is put to such great expense as to burden the national credit."). (June 6, 1934, ch. 404, title I, § 2, 48 Stat. 881; Pub. L. 94–29, § 2, June 4, 1975, 89 Stat. 97; Pub. L. 111–203, title IX, § 985(b)(1), July 21, 2010, 124 Stat. 1933.)

[60] Fischel & Ross, *supra* note 58, at 506.

[61] LOUIS LOSS, FUNDAMENTALS OF SECURITIES REGULATION 853, 860, n. 75 (2d ed. 1988).

that "the law governing manipulation has become an embarrassment – confusing, contradictory, complex, and unsophisticated."[62]

While the term manipulation is not clearly defined, like pornography, courts appear to know it when they see it. Courts generally take the position that manipulation is "virtually a term of art (that) … refers generally to practices, such as wash sales, matched orders, or rigged practices, that are intended to mislead investors by artificially affecting market activity."[63] The essence of manipulation is conduct or speech that "sends a false pricing signal to the market."[64]

A statutory prohibition of manipulation is contained in Section 9 of the Securities Exchange Act of 1934,[65] which, in 1940 survived a claim that it was unconstitutionally "vague, indefinite and uncertain."[66] In addition, of course Section 10b of the Securities Exchange Act of 1934 prohibits the use of any "manipulative or deceptive device" in connection with the purchase or sale of any security.[67]

Manipulation generally requires "intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of (a) security."[68] The term "manipulative" is considered a term of art in securities markets, indicating deliberate actions aimed at creating a false or misleading appearance of market activity or influencing the price of securities. Something more than negligence is required for conduct to constitute manipulation.

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[62] Edward T. McDermott, *Defining Manipulation in Commodities Futures Trading: The Futures "Squeeze,"* 75 NW. L. REV. 202, 205 (1979).

[63] Wilson v. Merrill Lynch & Co., 671 F.3d 120, 129–30 (2d Cir. 2011) (citing Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199, 96 S. Ct. 1375, 47 L.Ed.2d 668 (1976) as quoted in Onel v. Top Ships, Inc., 806 Fed. Appx. 64, 67, Fed. Sec. L. Rep. (CCH) ¶ 100,789 (2d Cir. 2020). *See also* Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 476, 97 S. Ct. 1292, 51 L.Ed.2d 480 (1977) (manipulation "refers generally to practices, such as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity,").

[64] Set Cap. LLC v. Credit Suisse Grp. AG, 996 F.3d 64, 76 (2d Cir. 2021); ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 100 (2d Cir. 2007).

[65] 15 U.S.C. §78i

[66] Wright v. S.E.C., 112 F.2d 89, 94 (2d Cir. 1940).

[67] 15 U.S.C. §78j(b) ("It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange … **(b)** To use or employ, in connection with the purchase or sale of any security … any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.").

[68] Ernst & Ernst v. Hochfelder, 425 U.S. 185, 199, 96 S. Ct. 1375, 47 L.Ed.2d 668 (1976)

Manipulation can be conceptualized as the mirror images of one another. As the prominent activist short seller Andrew Left, who was criminally charged with "a long running market manipulation scheme"[69] but claims to be guilty of nothing more than making many people aware of his "sincerely held" opinions about the stocks he was trading, observed in a *Wall Street Journal* opinion piece defending his trading practices, market manipulation is the "opposite" of insider trading."[70] Insider trading involves the improper use of material, nonpublic information and tends to result in share prices moving to reflect such information. Manipulation involves conveying false information signals to the market in an attempt to mislead the market for personal gain. Thus, while insider trading involves sending accurate signals to the market that wrongfully use information to drive share prices to more accurate levels, manipulation involves sending false signals to the market that drive share prices to less accurate levels.

The archetypal form of manipulation involves buying, lying and then selling high, which also is known as "pumping and dumping" because it involves spreading false, exaggerated, or misleading positive statements or rumors about a stock owned by a manipulator to generate hype and interest among other investors ("pumping") in order to sell or "dump" the stock when the pumping has increased the price of the shares.

The core element of the crime of manipulation is intent.[71] As Daniel Fischel and Stephen Ross explained decades ago, "there is no objective definition of manipulation. Everything turns on the intent of the trader."[72]

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[69] U.S. Dep't of Just., *United States v. Andrew Left*, Pending Criminal Division Cases (updated Jan. 12, 2026, last visited Jan. 20, 2026), https://www.justice.gov/criminal/criminal-vns/case/united-states-v-andrew-left; U.S. Dep't of Just., *Activist Short Seller Charged for $16M Stock Market Manipulation Scheme* (July 26, 2024), https://www.justice.gov/archives/opa/pr/activist-short-seller-charged-16m-stock-market-manipulation-scheme.

[70] Andrew Left, *I'm Being Prosecuted for the Opposite of Insider Trading*, WALL ST. J. (Jan. 16, 2026), https://www.wsj.com/opinion/im-being-prosecuted-for-the-opposite-of-insider-trading-3a7b5f85.

[71] United States v. Mulheren, 938 F.2d 364, Fed. Sec. L. Rep. (CCH) ¶ 96,082 (2d Cir.1991) (reversing conviction for manipulation due to failure to establish that defendant purchased stock with the intent to manipulate the price); LOUIS LOSS, FUNDAMENTALS OF SECURITIES REGULATION 855 (2d ed. 1988) ("In short, a *motive* to manipulate, when joined with the requisite series of transactions, *prima facie* establishes the manipulative *purpose* and shifts to the accused the burden of going forward with the evidence.").

[72] Fischel & Ross, *supra* note 58, at 512.

Classic forms of manipulation include wash sales and matched orders.[73] A wash sale is a maneuver that gives the appearance that trading in a security has occurred when it actually has not.[74] A matched order occurs when a trader places orders to buy and sell a security when the trader knows "that orders of substantially the same size, at substantially the same time and price, have been or will be entered by the same or different persons for the sale/purchase of such security."[75]

More generally, as observed in a popular securities regulation treatise:

> The mere fact that prices are affected by the defendant's conduct is not sufficient to establish manipulation. However, conduct that is reasonably calculated to directly affect price of a security can form the basis for a charge of manipulation. For example, artificially creating the false impression of an active market is manipulative. Thus, subjective intent combined with deceptive conduct can establish manipulation.[76]

While the law of manipulation is hardly a model of clarity, certain clear limiting principles do exist. First, an "essential element of a market manipulation claim is the injection of 'inaccurate information' into the market."[77] Second, and relatedly, establishing manipulation "requires an additional element, something beyond otherwise legal trading, which specifically injects false information into the market and/or creates an *artificial* demand for the underlying security."[78]

The requirement that an alleged market manipulator injected "inaccurate information" into the market or created a false impression of market activity is necessary to enable "courts to differentiate between

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[73] Thomas Lee Hazen, Treatise on Securities Regulation, Law Sec. Reg. § 12:3, What Constitutes Manipulative Conduct – Manipulation Defined (Nov. 2025 Update).

[74] Jerry W. Markham, Commodities Regulation: Fraud, Manipulation & Other Claims § 13.05 (2000) (also available on Westlaw) ("Wash sales" are pretended sales made openly in the pit or trading place for the purpose of deceiving other traders. They are employed to give false appearance of trading and to cause prices to be registered which are not true prices. They may be entered and recorded as real trades, but by agreement between the parties are either cancelled or "washed" out by other trades).

[75] Ernst & Ernst v. Hochfelder, 425 U.S. 185, 205 n.25, 96 S. Ct. 1375, 47 L. Ed. 2d 668, Fed. Sec. L. Rep. (CCH) ¶ 95,479 (1976).

[76] Hazen, *supra* note 73.

[77] GFL Advantage Fund, Ltd. v. Colkitt, 272 F.3d 189, 204 (3d Cir. 2001).

[78] *Id.*

legitimate trading activities that permissibly may influence prices, such as short sales, and ingenious devices that might be used to manipulate securities prices."[79]

Thus, while market manipulation can occur when a manipulator engages in deceptive trading or takes other actions designed to artificially raise or lower share prices, as well as when a manipulator makes deceptive statements as to the issuing corporation's value, "it is clear that the essential element of the claim is that inaccurate information is being injected into the marketplace."[80]

The point here is not to cast doubt on the broadly-held view that manipulation is a legitimate concern for regulators. Best understood, manipulation is a form of fraud in which manipulators seek to profit from creating the illusion of market activity or the illusion that a company's performance is better (or worse) than it actually is. Unlike fraud, however, which can be identified through objective evidence such as false or misleading statements, manipulation generally manifests itself though trading patterns that are intended to distort stock prices. This creates a problem because it requires "discern(ing) the intent of a trader" through manipulative trades that "are indistinguishable from nonmanipulative trades."[81]

Manipulation is notoriously difficult to prove, as reflected in *United States v. Mulheren,* perhaps the most famous stock market manipulation case in history.[82] This ultimately unsuccessful criminal market manipulation case brought against well-known market arbitrageur John Mulheren, then a partner and head trader at regional broker dealer firm, Jamie Securities Co. Mulheren, was charged with working with infamous fraudster Ivan Boesky, who had purchased 4.9% of the outstanding shares of Gulf & Western Industries, Inc. (G & W). On October 16, Martan Davis, the chairman of G & W's board of directors, wishing to rid itself of Boesky, agreed that G & W would repurchase Boesky's shares at the price at which G & W stock traded on the New York Stock Exchange at the time of the Boesky/ G & W transaction on October 17, 1985.[83]

The following day, on October 17, Boesky telephoned Mulheren and told him that he "liked" G & W stock and said that "it would be great if it traded at $45" per share.[84] Following that conversation, placing orders to be executed at the current market price, Mulheren bought

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[79] *Id.* at 205.
[80] *Id.*
[81] Fischel & Ross, *supra* note 58, at 521.
[82] United States v. Mulheren, 938 F.2d 364 (2d Cir. 1991).
[83] *Id.* at 366.
[84] *Id.* at 367.

50,000 shares of G& W stock at $44.75 and $44.875 per share.[85] Shortly after that, Mulheren placed a limit order to buy 25,000 G & W shares for $45.00 per share.[86] This order was executed at 11:10 AM. Seven minutes later, Boesky sold his shares back to G & W for $45.00 per share.[87] The closing price of G & W stock on October 17 was $43.625.[88] Mulheren ultimately sold his G & W shares for a loss. The government claimed that Mulheren bought G & W stock in a scheme to help Boesky get a higher price for his greenmail sale to G & W in exchange for unspecified future favors.[89]

Consistent with the twin observations that illegal market manipulation is very difficult to prove and that establishing a violation of the law requires a showing of intent, the government's prosecution was ultimately unsuccessful.[90] The Second Circuit reversed Mulheren's conviction, finding that Mulheren's conversation with Boesky was "at best ambiguous" and that nothing in the way the trades were executed reflected anything other than investment intent, as opposed to manipulative intent.[91] As Dan Fischel and David Ross trenchantly observe in their discussion of the *Mulheren* decision:

> First, the court's discussion shows that manipulative trades cannot be distinguished from nonmanipulative trades without refer- ence to the intent of the trader. Second, the court's analysis illustrates that the observable characteristics of trades cannot distinguish trades made with bad intent from trades made with good intent. Although the court did not say so explicitly, its analysis calls into question whether actual trades should be prohibited as manipulative.[92]

Fischel and Ross establish that manipulation is difficult to identify. This point is significant and has yet to be challenged, much less refuted in the decades since their article was published. But the claim that manipulation is hard to identify is very different from a claim that manipulation does not occur, or that it does not pose a problem for

85 *Id.* at 366-68.
86 *Id.* at 367.
87 *Id.* at 368.
88 *Id.*
89 *Id.*
90 *Id.* at 369.
91 *Id.* For a similar discussion of this case, see Fischel & Ross, *supra* note 58, at 533.
92 Fischel & Ross, *supra* note 58, at 533.

capital market participants and regulators. Rather, acknowledging the fact that stock market manipulation is a concern, the point developed in the following section of this Article is that it certainly is conceivable (i.e. theoretically possible) for issuers to engage in stock market manipulation, stock market manipulation by issuers is actually less of a concern than manipulation by others, and therefore SEC Rule 10b-18, which places constraints on issuer repurchases of their shares, is ill-advised and should be replaced by a rule that provides stronger safe-harbor protections for issuer repurchases.

It is a bit unclear why there is a need for a special rule regarding issuer repurchases of their own stock. There are two possible explanations. One possibility is that a special rule in the form of Rule 10b-18 is needed because issuers' share repurchases pose a particular problem that share repurchases by outside investors do not. In other words, special regulation might be justified if the risk of manipulation by issuers were somehow greater than the risk of manipulation by other market participants.

The second possible explanation, and the one that appears to explain the actual motivation for the rule, provides an important insight about the problems posed by attempts to regulate market manipulation, is that things were so confused that the SEC felt compelled to adopt its Rule 10b-18 to remove legal uncertainty and reduce the risk that ordinary issuer repurchases would be treated as illegal market manipulation

B. Do Issuers' Share Repurchases Pose a Particular Risk of Manipulation? The Significance of the Lack of any "Traditional Badges of Manipulation"

The fact that manipulation is not defined and the fact that it is so difficult to distinguish legitimate trading from manipulative trading go a long way towards explaining the existence of SEC Rule 10b-18. As one commentator banally observed, "[w]hen an issuer purchases its own securities there is the potential for manipulation."[93]

To date, however, no one has actually addressed the issue of whether share repurchases by issuers pose a particular problem that makes issuer share repurchases of greater concern for market participants and regulators than trading by non-issuers. In fact, there is no evidence that share repurchases pose any particular threat of stock market manipulation.

Over time, courts have identified a number of indicia of stock market manipulation under the Securities Exchange Act of 1934. These

[93] Hazen, *supra* note 73.

have been described as "traditional badges of manipulation."[94] Primary among these are wash sales, matched orders, and painting the tape, along with somewhat more modern schemes like spoofing, layering, and marking the close. Often these manipulation techniques will be employed in conjunction with the use of shenanigans like the creation of fictitious trading accounts and the dissemination of false information (the old lie, buy and sell high routine) that are commonly used in conjunction with these traditional badges of manipulation. The point here is very simple. Share repurchases by issuers are not a particular problem, and the fact that such trading does not involve any of the traditional badges of manipulation is a strong indication that, regardless of what other problems might be posed by share repurchases, stock market manipulation is not among them.

Wash Sales

Wash Sales are trades that create a false appearance of market activity despite the fact that the transactions do not cause any actual change in the beneficial ownership of the securities being traded.[95] Wash sales have been characterized as inherently fraudulent because they create an artificial appearance of activity in the market without any real change in ownership.[96] Such trades "operate as a fraud or deceit on the market because the trades, along with their contrived prices, are reported to the market and thereby create a false appearance of market activity that does not reflect the true supply and demand for the securities at issue,"[97] which inflates the apparent volume of trading in the security, and appears "designed to attract additional market participants and thereby artificially increase the stock price."[98]

Matched Orders

Matched Orders are "orders for the purchase or sale of a security that are entered with the knowledge that orders of substantially the same size, at substantially the same time and price, have been or will be entered by the same or different persons for the sale or purchase of such security."[99] As with several of the forms of manipulation discussed

[94] United States v. Mulheren, 938 F.2d 346, 370-71 (2d Cir. 1991).

[95] The District Court in *In re Enron Corp. Securities* described wash sales as fictitious transactions designed to mislead investors about actual supply and demand. In re Enron Corp. Sec., Derivative & ERISA Litig., 235 F.Supp. 2d 549, 579 (2002).

[96] Hudson Bay Master Fund Ltd. v. Patriot Nat'l, Inc., 309 F.Supp. 3d 100, 116 (2018).

[97] S.E.C. v. Williky, No. 1:15-CV-0357-WTL-MJD, 2018 WL 3729137, at *1 (S.D. Ind. Aug. 3, 2018), *aff'd* sub nom. S.E.C. v. Williky, 942 F.3d 389 (7th Cir. 2019).

[98] *Id.*

[99] Dietrich v. Bauer, 76 F.Supp. 2d 312, 340 (1999).

here, manipulators engaged in placing matched orders, for the same reason as they engage in wash trading, which is to generate the illusion of significant trading volume and price movement. This increased activity is designed to create a false impression of genuine investor interest and upward or (in the case of short selling) downward momentum in the price of the stock. The manipulators hope that unsuspecting retail investors will be drawn in by the perceived excitement and start buying (or selling) the stock, driving the price further up (or down), at which point the manipulators sell their shares or cover their short positions and make a profit,.

Painting the Tape

Painting the Tape also involves creating an appearance of trading activity without an actual change in beneficial ownership.[100] This is done by initiating multiple offers to purchase stock within short periods at increasing prices to artificially inflate the stock price and create false appearance of legitimate market demand.[101] Those involved in painting the tape operate under the assumption that buying and selling a security to create the illusion of high trading activity will attract other traders whose subsequent trading will then push up the price.[102]

Spoofing and Layering

Spoofing and layering are somewhat more modern and somewhat more sophisticated techniques for manipulating securities prices. Spoofing consists of entering bids of offers to purchase or sell securities to create the impression that there is actual buy or sell interest among investors, but with the intent to cancel the bid or offer before it is executed.[103]

Layering involves placing multiple limit orders[104] to buy (or sell) securities at various price levels to manipulate market conditions by

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[100] S.E.C. v. Fiore, 416 F. Supp. 3d 306, 316 (S.D.N.Y. 2019).

[101] *Id.*

[102] *See Painting the Tape*, NASDAQ, https://www.nasdaq.com/glossary/p/painting-the-tape#:~:text=Illegal%20practice%20by%20traders%20who,may%20push%20up%20the%20price (last visited Jan. 22, 2026).

[103] Harrington Glob. Opportunity Fund, Limited v. CIBC World Markets Corp., 585 F.Supp. 3d 405, 415–16 (2022); U.S. Commodity Futures Trading Comm'n v. Oystacher, 203 F.Supp. 3d 934, 938 (N.D. Ill. 2016).

[104] 3 Order Types: Market, Limit, and Stop Orders, CHARLES SCHWAB (June 11, 2024), https://www.schwab.com/learn/story/3-order-types-market-limit-and-stop-orders ("A limit order is an order to buy a stock with a restriction on the maximum price to be paid that is lower than the current market price or to sell a stock at a minimum price to be received that is higher than the current market price. A limit order to buy will be filled only if the

creating an artificial appearance of supply or demand to improve the prices they receive for other orders that they do intend to execute.[105]

Marking the Close

Marking the Close is the practice of trading at or near market close to influence closing prices.[106] Often, as explained by the Southern District of New York in *Securities & Exchange Commission v. Masri,* marking the close involves the practice of repeatedly executing the last transaction of the day in a security in order to affect its closing price."[107] And the Southern District of New York in *Securities & Exchange Commission v. Hwang* described marking the close as engaging in substantial trading at the end of the trading day to push stock prices upward.[108]

The significance of what have been called these "traditional badges of manipulation" is difficult to overstate.[109] For example, in the classic manipulation case *U.S. v. Mulheren*, discussed above, a significant factor in the Second Circuit's decision to reverse Mulheren's conviction was that none of the traditional badges of manipulation," including matched orders and wash sales were employed by the defendant.

The point here, of course, is that issuer share repurchases do not involve any of the indicia of manipulation for the simple reason that share repurchases are not manipulative. Of course, as with any trader, if an issuer were to lie about the company in order to distort the company's share price, and then trade at the distorted price, then such trading would be sanctioned. But there is no reason to believe or evidence to support the notion that this sort of fraud is a particular problem for issuers.

As discussed above, share repurchases may be effectuated in a variety of ways including open market purchases, tender offers (either in the form of a fixed price offer or a Dutch auction), private directly negotiated purchases, and Accelerated Share Repurchases (ASRs). None of these strategies for repurchasing stock involves any sort of conduct remotely that even remotely resembles the wash sales, matched orders, painting the tape, spoofing, layering, or marking the close that signal possible manipulation.

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price of the stock drops to the specified limit price or lower. A limit order to sell will be filled only if the price of the stock rises to the specified limit price or higher. There is no assurance that a limit order will actually be executed.").

105 S.E.C. v. Lek Sec. Corp., 370 F.Supp. 3d 384, 390 (S.D.N.Y. 2019).

106 Koch v. S.E.C., 793 F.3d 147, 149 (D.C. Cir. 2015).

107 S.E.C. v. Masri, 523 F.Supp.2d 361, 369 (S.D.N.Y. 2007).

108 S.E.C. v. Hwang, 692 F.Supp. 3d 362, 373 (S.D.N.Y. 2023).

109 United States v. Mulheren, 938 F.2d 346, 370-71 (2d Cir. 1991).

Despite the unlikelihood of stock market manipulation by issuers engaged in share repurchases, the specter that manipulation might occur remains a concern despite the lack of evidence or theoretical support for the notion that manipulation poses a potential problem. The primary concern about stock price manipulation by issuers is that an issuer might artificially inflate its stock prices through strategic repurchase timing and volume.

For example, courts have recognized that repurchase programs have the potential to be manipulative by artificially boosting share prices in cases where they have searched for, but failed to observe, any actual manipulation.[110] Thus, courts often end up acknowledging that share repurchases serve legitimate corporate purposes,[111] and that it makes no economic sense for companies to buy back stock at prices they know to be inflated.

Consistent with this analysis, financial economists have examined whether share repurchases are used to manipulate stock prices by inflating the earnings per share (EPS) of companies repurchasing their shares and have found that repurchases are not used in this way. Specifically, Guest, Kothari, and Venkat tested the empirical validity of the three major claims regarding stock market manipulation in the context of stock repurchases.[112] These three claims are that: share repurchases: (a) manipulate stock prices to inflate EPS (which benefits management whose compensation rises when EPS increase); (b) inflate stock prices to increase top management compensation tied to share price performance; and (3) reduce investments by companies.

Guest, Kothari, and Venkat find that the trading volumes of share-repurchasing firms are not different from those of non-repurchasing firms, which is inconsistent with clam that repurchases are creating a false sense of demand that boosts stock prices. As for the second criticism, the authors find that the CEO compensation of share-repurchasing firms and non-repurchasing firms do not differ significantly from one another, which of course, is inconsistent with the claim that repurchases boost executive compensation. Guest, Kothari and Venkat find that repurchasing firms are more profitable than non-repurchasing firms, thereby undermining the third claim, which is that repurchases are depriving firms of investment opportunities.

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110 Alabama Farm Bureau Mut. Cas. Co., Inc. v. Am. Fid. Life Ins. Co., 606 F.2d 602, 613 (1979).

111 Frankfurt-Tr. Inv. Luxembourg AG v. United Techs. Corp. 336 F.Supp. 3d 196 (S.D.N.Y. 2018).

112 Nicholas Guest, S.P. Kothari & Parth Venkat, *Share Repurchases on Trial: Large-Sample Evidence on Share Price Performance, Executive Compensation, and Corporate Investment*, 52 FIN. MGMT. 19 (2023).

Similarly, Subramanian Iyer, Kose John and Ramesh Rao find that repurchasing firms do not exhibit significantly higher CEO compensation compared to non-repurchasing firms. They also find that there is no evidence that share repurchases are implemented to inflate CEO pay.[113] Iyer, Kose John and Rao also find that share repurchases do not increase pay inequality, as measured by the gap in wages between the highest paid employees and the lowest paid employees in firms making share repurchases.

Despite the unproblematic nature of share repurchases, repurchases were considered to pose so much legal and regulatory risk for issuers that they were rare until the SEC promulgated Rule 10b-18, which provided a roadmap for how companies could effectuate repurchases with less risk of being charged with manipulation. As Li, Ye and Zheng observe the situation:

> Before the adoption of Rule 10b-18, share repurchases could easily expose a firm to charges of market manipulation under the Securities and Exchange Act of 1934 Section 9(a)(2) and Section 10(b). Repurchase programs were rare until the rule came into effect because of the threat of being charged with manipulation for inflating stock prices.[114]

Put simply, the way to understand SEC Rule 10b-18 is that the legal landscape governing stock market manipulation was such a morass that even the most innocent, anodyne and welfare enhancing share repurchases risked attracting costly litigation and SEC enforcement actions. Rather than craft a rule that provided a workable definition of manipulation and clear guidance for all traders, the SEC enacted a rule that applies only to issuers. While passage of the rule was an improvement on the prior regulatory regime which was characterized by massive uncertainty about the legality of literally *any* issuer repurchase program, the point of this article is that it is still far too restrictive.

[113] Kose John, Subramanian R. Iyer & Ramesh P. Rao, *Politics and Regulation of Share Repurchases: Theory and Evidence*, S&P GLOB. MKT INTEL. 1, 4 (Sept. 27, 2024). Available at SSRN: https://ssrn.com/abstract=4969150 or http://dx.doi.org/10.2139/ssrn.4969150

[114] Li, Ye & Zheng, *supra* note 21, at 4.

III. Unnecessary Regulatory Impediments to Share Repurchases

Not surprisingly, in light of the chaotic nature of the law related to stock buybacks, as the SEC has observed, "issuers are reluctant to undertake any repurchases without the certainty that their purchases come within the Rule's (SEC Rule 10b-18's) safe harbor."[115] In fact, as market structure experts have observed "in practice, all buyback programs are structured to comply with the Rule."[116] The problem with the SEC rule is that it does not go nearly far enough to enable share repurchases by issuers.

A. SEC Rule 10b-18

The SEC Rule 10b-18 "safe harbor" for companies conducting open-market repurchases only protects issuers from liability provided that four conditions are met. Specifically, issuers are prohibited: (a) from utilizing the services of more than a single broker on any given day; (b) from trading at the opening of trading or near the close of the trading day; (c) from repurchasing more than 25% of the average daily trading volume (ADTV) of their common stock on any given day; and (d) from purchasing shares at a price that exceeds the highest independent bid or the last independent trade price reported in the consolidated tape system.[117]

Rule 10b-18's Single Broker/Dealer Condition

The requirement that trades be effectuated through a single broker limits the strategies that issuers can use to reduce the price at which they repurchase shares. As with other market participants, issuers have concerns about information leakage and front-running of their trades by high frequency traders and other sophisticated market participants.[118]

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115 Securities and Exchange Commission, Rule 10b-18 and Purchases of Certain Equity Securities by the Issuer and Others, 17 CFR Parts 228, 229, 240, and 274, [Release Nos. 33-8160; 34-46980; IC-25845; File No. S7-50-02], 67 CFR 77594, at 775595 (Dec. 18, 2002).

116 Letter from John Ramsay, Chief Market Policy Officer, Inv. Exch. LLC (IEX), to Brent J. Fields, Secretary, SEC (Mar. 27, 2018), https://www.sec.gov/files/rules/petitions/2018/petn4-722.pdf.

117 17 CFR § 240.10b-18. The "consolidated tape system" refers to the infrastructure that aggregates and disseminates transaction and quotation data from multiple securities exchanges and market centers into unified data feeds. This system operates through several interconnected components that collectively form what Rule 10b-18 references as the "consolidated system."

118 Front-running is defined as using the knowledge of a large, incoming order to take a favorable position in the market. Jacob Adrian, *Informational*

Rule 10b-18's Timing Conditions

The timing conditions prohibiting repurchases at the open of trading or near the market close are based on the assumption that the stock market is particularly vulnerable to manipulation during these critical trading periods.[119] The restrictions are based on the assumption that markets are vulnerable to manipulation at the market opening and the market close because trading volumes are typically lower during those times and individual transactions can have disproportionate impact on stock prices. The timing conditions of Rule 10b-18 require that issuer repurchases must not be the opening purchase reported in the consolidated system.[120] In addition, for securities with average daily trading volume of $1 million or more and public float value of $150 million or more, repurchases are prohibited during the 10 minutes before the scheduled close of the primary trading session.[121] For all other securities, purchases are prohibited during the 30 minutes before the scheduled close.[122]

The rule provides some limited flexibility for issuers to trade after the market closes by allowing purchases after the primary trading session closes until the termination of last sale price reporting, provided they no purchases are made at prices higher than the lower of the closing price and any subsequent lower bids or sale prices.[123]

Of course, it is difficult to quantify the extent to which these regulations make issuer repurchases less frequent or more expensive. There is some justification for the concern that purchases at the open or near the close of trading is susceptible to manipulation, there is no evidence or theoretical support for the assumption that trading by *issuers* at the open or the close presents any greater potential for manipulation than trading by any other investor during these periods of time. For example, it is tempting for certain traders to try to manipulate closing stock prices because closing price serves as a benchmark for various

Inequality: How High Frequency Traders Use Premier Access to Information to Prey on Institutional Investors, 14 DUKE L. & TECH. REV. 256 (2016), available at https://scholarship.law.duke.edu/dltr/vol14/iss1/11. Front running by high-frequency traders (HFTs) is an electronic trading strategy where HFTs use algorithms to detect large, incoming institutional buy/sell orders (including orders by issuers) and rapidly execute trades on other exchanges before the institutions/ issuers can complete their own trading operations. By exploiting microsecond speed advantages, HFTs can profit by buying before the issuer or other institutional investor can do so. *Id. See also* MICHAEL LEWIS, FLASH BOYS: A WALL STREET REVOLT 72 (W.W. Norton & Co. 2014).

[119] 17 CFR § 240.10b-18.

[120] 17 CFR § 240.10b-18

[121] 17 CFR § 240.10b-18

[122] 17 CFR § 240.10b-18

[123] 17 CFR § 240.10b-18

purposes, including mutual fund valuations, performance measurements, and derivative settlements. The simple solution to this problem is to restrict or subject to scrutiny contracts that use closing prices as a benchmark.[124]

The use of rolling averages is a standard and obvious way to deal with the problem that drawing conclusions from a single data point like an opening or closing stock price can provide a distorted indication of value due to random fluctuations inherent in volatile markets. Rolling averages — also known as moving averages — are the accepted way to deal with volatile data. A rolling average is computed by taking the average of several data points during a particular period or periods of time. This virtually eliminates the influence of short-term fluctuations and highlights longer-term trends.[125]

Rule 10b-18's Volume Limitations

The volume condition establishes purchase limits that appear designed to mitigate the market impact of issuer repurchases by restricting daily purchase amounts. The total volume of Rule 10b-18 purchases by the issuer and affiliated purchasers on any single day must not exceed 25 percent of the average daily trading volume for that security, calculated over the four calendar weeks preceding the week of purchase.[126] The single exception allowed under the Rule is that issuers may make a single block purchase each week in lieu of the 25 percent limit, provided no other Rule 10b-18 purchases occur that day and the block purchase is excluded from future average daily trading volume calculations.[127]

Rule 10b-18's Price Conditions

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[124] Courts have posited in manipulation cases that purchases or sales at the opening of the trading day can significantly influence investor perceptions and subsequent trading activity. Prager v. Knight Trading Group, Inc., 250 F.Supp. 2d 412, 420 (D.N.J. 2001). Similarly, trading towards the end of the trading day are a concern because of the practice of "marking the close," which involves executing trades near market close specifically to influence closing prices. Koch v. S.E.C., 793 F.3d 147, 152 (D.C. Cir. 2015), S.E.C. v. Hwang, 692 F.Supp. 3d 362 (S.D.N.Y. 2023). As the court in *S.E.C. v. Masri* explained, transactions made at the close of the day are "more capable of artificially affecting the price of the security" because of reduced trading volume and heightened price sensitivity during these periods. S.E.C. v. Masri, 523 F.Supp. 2d 361, 370 (S.D.N.Y. 2007).

[125] Smoothing Data with Moving Averages, Federal Reserve Bank of Dallas (last visited Jan. 25, 2025), https://www.dallasfed.org/research/basics/moving.

[126] 17 CFR § 240.10b-18.

[127] 17 CFR § 240.10b-18.

The price condition which prohibits issuers from paying prices above the highest independent bid or last independent trade price is the most severe and limiting restriction. This rule establishes specific price limits for repurchases and constitutes Rule 10b-18's most significant burden on repurchases.

Rule 10b-18's restrictions ostensibly are designed to prevent issuers from paying artificially inflated prices that could manipulate market values.[128] Rule 10b-18 purchases must be affected at prices that do not exceed the highest independent bid or the last independent transaction price, whichever is higher, as quoted or reported in the consolidated system.[129] For securities not quoted in the consolidated system, purchases must not exceed the highest independent bid or last independent transaction price displayed on national securities exchanges or inter-dealer quotation systems.[130] For securities whose quotes are not displayed on a national securities exchanges or inter-dealer quotation system, purchases must be at prices no higher than the highest independent bid obtained from three independent dealers.[131]

This rule, sometimes referred to as the "zero plus tick requirement" has been explained with the following example, if the last sale of a security is $10.00, and the national best bid and offer is $10.00 (bid) x $10.01 (offered), a company cannot rely on the Rule's safe harbor if it buys back its shares at the lowest offered price of $10.01 unless some other buyer does so first.[132]

According to the SEC this requirement ostensibly is "designed to minimize the market impact of the issuer's repurchases, thereby allowing the market to establish a security's price based on independent market forces without undue influence by the issuer."[133] Influencing share price is not the same as manipulation. In fact, to the extent that purchases by an issuer (or any other trader) conveys information to the market and causes share prices to adjust to more accurate prices, such trading is the opposite of manipulation, and issuers' repurchase convey information that exerts directional pressure on share prices that lead to more efficient capital markets pricing and a more efficient allocation of capital among companies.

This is, of course, due to the fact that issuers' repurchases often convey legitimate valuable information – both good and bad – to the

128 17 CFR § 240.10b-18.
129 17 CFR § 240.10b-18.
130 17 CFR § 240.10b-18.
131 17 CFR § 240.10b-18.
132 Ramsay, *supra* note 116, at 2.
133 Securities and Exchange Commission, *supra* note 115, at 67 Fed. Reg. 77594.

market and therefore should influence stock prices. For example, a repurchases might signal the bad news that the repurchasing company lacks new ideas or investment opportunities and therefore can do nothing better with cash not required to fund operations and pay creditors than to return it to their shareholders through share repurchases. Alternatively, a share sometimes conveys the good news that the company is so confident of its ability to generate cash that it has less need of investors' money than it previously had thought.

The price conditions imposed by Rule 10b-18 make share repurchases particularly difficult for all but the largest public companies. The goal of the Rule is to eliminate the price impact of share repurchases. It is not difficult to for extremely large companies to avoid the price impact of share repurchases because the markets or such companies' shares have such significant trading volume and liquidity that repurchases can be absorbed without a price impact. For smaller firm, with lower stock market capitalizations, less liquidity and lower daily trading volumes, a share repurchase, particularly one of any significant size, is far more likely to disrupt prices.

For this reason, it is not surprising that most share repurchases are done by the largest companies. For example, the top twenty companies in the S&P 500 historically have accounted for slightly less than half of all share repurchases. In the second quarter of 2025, repurchases by such companies accounted for 51.3%, of all share repurchases in the U.S.[134] Apple alone, the largest U.S. company by market capitalization, accounted for more than 10 percent of all stock buybacks in 2024.[135] Over the five years period ending in 2025, ten companies accounted for 34 percent of all buyback activities.[136]

Thus, the so-called "Mega Cap" companies like Apple, Alphabet (Google), Nvidia, Meta, JPMorgan Chase and Wells Fargo, account for a disproportionate share of stock buybacks.[137] Thus, while there is "widespread participation" in buybacks among the country's largest companies, with 87 percent of companies in the S&P 500 engaging in buybacks in 2024,[138] the lion's share of repurchase activity is done by the largest companies.

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[134] S&P Global, *supra* note 15.

[135] *Id.*

[136] *Id.* These companies, Apple, Alphabet, Nvidia, Meta Platforms, JPMorgan, Exxon Mobil, Microsoft, Bank of America, Visa and Wells Fargo, purchases shares valued at $1,508.6 billion out of a total of $4,445 billion purchased during this period.

[137] *Id.*

[138] *Id.*

Not only does complying with these conditions fail to prevent manipulation compliance with the rule has "the ironic effect of allowing manipulation by making corporate buyback orders predictable, easy to detect, and easy to exploit, thus opening the door for short-term (high frequency) traders (and others) to take advantage of these orders for short-term profit."[139]

The problem has been described as follows, [i]t is a "common pattern" for brokers trying to execute buyback orders for an issuer to place "orders at the bid price, followed by purchases at the offer price only after another participant pays that [offer] price."[140] This trading pattern:

> makes those orders easily identifiable and slow moving, thus allowing them to be targeted by traders that can use faster, more sophisticated strategies to manipulate upward the price of the security, which then increases the prices that issuers must pay. … For example, a short-term trader that has identified a pattern that shows the existence of a buyback purchaser in the market may accumulate shares at the offer price without competition from the issuer, which is restricted by the rule, and then resell the same shares to the issuer, which is forced to pay successively higher last sale prices to meet its buyback objectives.
>
> This problem is well-known in the industry and undermines the ability of a corporate issuer or broker acting on its behalf to properly construct a trading strategy to effectively purchase shares with minimal detection at the best prevailing prices.[141] As the global head of trading at a large asset manager put it: "*When it comes to handling the corporate buyback, what's painfully obvious to us is that the corporate buyback is probably the most gameable order in the marketplace. If you pursue liquidity in a corporate buyback algorithm, other participants can easily sense how the algorithm is going to react and try to trade in front of it.*"[142]

[139] Ramsay, *supra* note 116, at 2.
[140] *Id.*
[141] *Id.*
[142] *Id.* (quoting Letter from Howard Meyerson, General Counsel,

The social harm from Rule 10b-18's limitations on the price paid by repurchasers is particularly acute in light of the fact that for a share repurchase to be successful, the company must induce the most optimistic cohort of investors, i.e. the company's incumbent shareholders, to part with their shares without obtaining any premium or price improvement over the existing market price. And, of course, if shareholders wanted to sell their shares at the current market price, they already would have done so.

As shown above, heterogeneous beliefs about a corporation's prospects result in a downward sloping demand curve for a corporation's shares. The shareholding population of a company at any point in time are the subset of the investor community who are the most optimistic about the company's prospects. As a result of this optimism, these often will prefer not to sell their shares absent a meaningful premium. SEC Rule 10b-18 clearly inhibits share repurchases by eliminating the ability of companies to pay a premium over market for their shares.

The restrictions on repurchases imposed by Rule 10b-18 are particularly ill-advised in light of the fact that issuer repurchases were never a significant problem. There is no evidence that repurchases have been used to manipulate the market to any appreciable extent. In fact, courts explicitly have recognized that the SEC has "never substantiated the threshold proposition that improperly motivated buybacks are actually a problem"[143] and the SEC itself has recognized that it cannot premise rulemaking on the notion that "improperly motivated buybacks regularly occur' in 'significant numbers.'"[144] Nevertheless, the SEC has proposed regulating repurchases even more intrusively than contemplated by SEC Rule 10b-18 by requiring more detailed disclosure, including disclosure of issuers' rationales for making repurchases and the daily collection and quarterly filing of data about their repurchase activities.[145]

Liquidnet, Inc., to SEC (Mar. 7, 2011) (on file with author, citation omitted)).

143 Chamber of Com. of United States v. S.E.C., 85 F.4th 760, 777 (5th Cir. 2023).

144 Securities and Exchange Commission, Share Repurchase Modernization, 17 CFR Parts 229, 232, 240, 249, and 274, [Release Nos. 34-97424; IC-34906; File No. S7-21-21]88 Fed. Reg. 36002, at 36007.

145 Chamber of Com. of United States v. S.E.C., 85 F.4th 760, 771 (5th Cir. 2023). This rule was officially adopted by the SEC but is currently subject to a limited remand following the Fifth Circuit's decision in *Chamber of Commerce*. The court found the SEC's adoption arbitrary and capricious due to the agency's failure to respond to petitioners' comments and adequately substantiate the rule's benefits and costs. *Id.* However, the court did not vacate the rule entirely, and it instead directed the SEC to correct the identified defects and retained jurisdiction to review the agency's response. *Id.* at 778. On

These rules were found to have been improperly adopted by the SEC in violation of the Administrative Procedure Act because there the required cost-benefit analysis was not done and because the SEC failed to respond to the comments submitted by the U.S. Chamber of Commerce and the other petitioners. If the rules had been adopted, issuers would have been required to compile tabular disclosures of their stock repurchases on a daily basis along with detailed narratives about the rationale for such repurchases.[146]

A better way to regulate share repurchases would be to provide a broad, general safe harbor from manipulation challenges for all repurchases by issuers unless it could be shown that such repurchases were motivated by problematic factors such as executive compensation arrangements tied to closing share prices (as opposed to a rolling average of share prices) or other special facts.

For example, where a company agrees to acquire another company using stock as payment for the shares and the number of shares to be paid depended on the acquirer's stock price at a particular point in time or during a specified period, the acquirer might be tempted to make repurchases in order to reduce the number of shares required to make the acquisition.[147] This sort of shenanigans may provide a legitimate basis for concern about an issuers' share repurchase, but absent such special facts, the special restrictions on issuer share repurchases necessary to obtain safe harbor protection are not advisable.

Alternatively, another modest and reasonable way to alleviate at least some of the chilling effects of Rule 10b-18 on share repurchases would be to allow repurchases at the midpoint of the National Best Bid and Offer (NBBO) rather than at prices that do not exceed the highest independent bid or the most recent transaction price, whichever is

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December 1, 2023, the SEC filed a letter with the court stating that it would not be able to correct the rulemaking defects within the remand period, which the agency had unsuccessfully sought to extend. Following this, in an opinion issued on December 19, 2023, the court vacated the SEC's share buyback rule. Pamela Marcogliese, Taryn Zucker, Aashim Usgaonkar & Amy DiPauli, *US Appeals Court Vacates SEC Share Repurchase Rule After Holding that the SEC Acted "Arbitrarily And Capriciously" in Adoption Of Such Rules*, FRESHFIELDS (Nov. 3, 2023), https://blog.freshfields.us/post/102irse/update-us-appeals-court-vacates-sec-share-repurchase-rule-after-holding-that-the.

146 Chamber of Com. of United States v. S.E.C., 85 F.4th 760, 767 (5th Cir. 2023).

147 This is what the SEC alleged occurred in *SEC v. Georgia-Pacific Corp.*, [1964-66 Transfer Binder] CCH Fed. Sec. L. Rep. 91,692 at 95,525 (S.D.N.Y. 1966), discussed in Steve Thel, *Regulation of Manipulation Under Section 10(b): Security Prices and the Text of the Securities Exchange Act of 1934*, 1988 COLUM. BUS. L. REV. 359, 422–23 (1988), available at: https://ir.lawnet.fordham.edu/faculty_scholarship/677.

higher.[148] The midpoint pricing proposal would amend Rule 10b-18 to allow corporate buyback orders to execute at or below the midpoint of the National Best Bid and Offer (NBBO). This change aims to modernize the Rule by enabling the use of midpoint order types, which are neutral and do not signal large buyer activity in the market. Midpoint orders execute at a price between the best bid and offer, avoiding manipulation and protecting corporate issuers from exploitative trading strategies. This proposal seeks to address the unintended consequences of the current Rule, which makes buyback orders predictable and vulnerable to exploitation by short-term traders.

B. The Trade-Through Rule

The Trade-Through Rule is the popular name for Rule 611 of the SEC's National Market System regulation.[149] The Rule is more formally known as the Order Protection Rule. The Trade-Through Rule was promulgated to ensure that investors receive the best available price when executing trades in the stock market. It prohibits trading at a price that is worse than the best available price displayed on a national securities exchange or market center. In other words, it requires that orders be executed at the National Best Bid and Offer (NBBO) price or better. For example if the best bid for a security is $100, but that bid is only good for 100 shares, the Trade-Through Rule prohibits a seller from "trading through" this quoted bid and selling, say 500 shares at a lower price (say, $99.99) to a bidder willing to acquire a larger block of shares albeit at a lower price.

The rule ostensibly protects investors from being disadvantaged by trades executed at inferior prices, promoting fairness and transparency in the market. A key feature of the Trade-Through Rule, besides this central "best price priority" feature is that an exemption to the rule for trades executed in a private market such as a dark pool, provided the price improvement exceeds a specified threshold. For this reason, dark pools often execute trades at the mid-point between the best bid and best offer generally available in the market.[150]

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[148] This rule was suggested by Ramsay, *supra* note 116, at 2.

[149] 7 CFR § 242.611 (Rule 611 of Regulation NMS).

[150] A dark pool is a private, off-exchange trading venue where institutional investors and other large traders can buy and sell securities anonymously. Unlike traditional stock exchanges, dark pools do not display the order book or trade details to the public, allowing participants to execute large trades with less risk of significantly impacting the market price. Important features of dark pools include anonymity, price matching of the prices on the major exchanges and participation limited to certain institutional investors, such as mutual funds, hedge funds, and pension funds, who typically trade large blocks of shares.

The Trade-Through Rule often conflicts with SEC Rule 10b-18, which sets price ceilings for share repurchases to prevent price manipulation. As discussed above, Rule 10b-18 requires that repurchases occur at or below the independent bid price or the most recent transaction price. The Trade-Through Rule's requirement for price improvement in dark pools (typically 2.5 cents above the best stock exchange quote) can make it difficult for issuers to comply with Rule 10b-18, as buying above the independent bid price is not permitted under the Rule's safe harbor provisions and likely would be viewed as manipulation. This feature of Rule 10b-18 limits the ability of firms to repurchase shares efficiently in dark pools. As Li, Ye and Zheng point out, these conflicts between the Trade-Through Rule and 10b-18 "impose an implicit ban on repurchasing in dark pools."[151]

The introduction of the Trade-Through Rule interacts with Rule 10b-18 to effectively prevent issuers from effectuating repurchases on dark pools because issuers cannot match the price improvement required by the Trade-Through Rule without violating Rule 10b-18's price ceiling. As such, as Le, Ye, and Zhang demonstrate, dark pools were important platforms for share repurchases before they were implicitly banned by these regulations. Rule 10b-18 should be reformed to allow issuers to match or beat the price improvement required by the Trade-Through Rule and the Trade-Through Rule should be reformed to no longer require price improvement for issuer repurchases on dark pools.

IV. Share Repurchases and Corporate Governance

Both share repurchases and dividend payments play an important role in corporate governance. In this section of the Article, I first explain what those advantages are and then explain why buybacks are better. Some of the advantages that share repurchases have over dividend payments are well known. Others have gone unrecognized.

A. Benefits from Both Stock Repurchases and Dividend Payments in Corporate Governance and Corporate Finance

1. Credibly Signaling Managerial Confidence

Both dividends and repurchases can signal strong future earnings to shareholders, which helps build trust and confidence in management. This signaling reduces information asymmetry between managers and shareholders, addressing a key aspect of agency problems. In summary, payouts reduce agency problems by limiting managerial discretion over

[151] Li, Ye & Zheng, *supra* note 21, at 9.

excess cash, aligning incentives through stock-based compensation, and signaling financial health to shareholders.

2. Reducing Agency Costs and Restoring Historic Debt Equity Ratios

In a seminal article,[152] Frank Easterbrook posits that dividend payments help mitigate the agency costs arising from the divergences between managers' interests and shareholders' interests. Managers may prioritize their own goals, such as avoiding risk or utilizing corporate resources for their personal benefits over maximizing shareholder value. Easterbrook explains that dividends reduce these costs by forcing firms to raise new capital, which subjects managers to external monitoring and scrutiny by investors and financial intermediaries.[153]

Easterbrook analysis of the economic justifications for dividend payments applies with equal force to share repurchases. For example, Easterbrook observes that regular dividend payments compel firms to enter the capital market, where investment bankers and new investors act as monitors, ensuring managers act in shareholders' best interests. Easterbrook's point that dividend payments serve the salutary corporate governance function of disciplining managers by compelling them to make regular visits to the capital markets also applies to share repurchases, albeit perhaps with not quite as much force. When a corporation cancels or reduces an historical dividend payment the "cut is often viewed as a sigh of weakness and frequently results in a decline in the price of the company's stock."[154] As such, managers "seek to avoid making changes in their dividend rates" and attempt to "stabilize dividend distributions."[155]

This phenomenon, sometimes referred to as dividend "stickiness,"[156] does not always apply with equal force to share repurchases. However, it clearly is the case that companies can, if they so choose, announce a program of share repurchases that they plan to continue into the future. For example, Apple Inc. has had a practice of regularly purchasing its shares. Since 2012 the Company has returned over

152 Easterbrook, *supra* note 11, at 653.

153 *Id.*

154 Hartford Funds, *The Power of Dividends: Past, Present, and Future*, https://www.hartfordfunds.com/insights/market-perspectives/equity/the-power-of-dividends.html#:~:text=A%20dividend%20cut%20is%20often,price%20of%20the%20company's%20stock (last visited Jan. 26, 2026).

155 John Lintner, *Distribution of Incomes of Corporations Among Dividends, Retained Earnings, and Taxes*, 46 AM. ECON. REV. 97, 99-100 (1956).

156 Ilan Guttman, Ohad Kadan & Eugene Kandel, *Dividend Stickiness and Strategic Pooling,* 23 REV. FIN. STUD. 4455, 4456 (2010).

$800 billion of profits to shareholders in repurchases,[157] in addition to making regular dividends payments.[158] In May 2024, Apple Inc. announced future plans to repurchase an additional $110 billion, which is among the largest buyback programs in history.[159]

While companies that have declared one or more dividend payments in the past are not compelled to continue making such payments indefinitely in the future, companies that make dividend payments often believe that they must "declare them regularly and raise them from time to time or face disquiet from investors."[160] The same thing is presumably true for companies that announce that they are adopting a policy of regularly making share repurchases or have established a tradition of doing so.

Another attribute that share repurchases share with the characteristics identified by Easterbrook are that, like dividend payments, share repurchases serve to adjust debt-equity ratios of the companies making such repurchases, which avoids wealth transfers between shareholders and bondholders that occur when a firm's financial position improves, causing the debt equity ratio to fall below the ratio in place when indebtedness originally was incurred.[161] Specifically, like dividend payments, share repurchases adjust a company's debt/equity ratio by reducing the company's equity by the amount of the payment and simultaneously increasing debt to the extent that the company borrows money to make the share repurchase.

As Easterbrook explains, if a company has prospered and its earnings raise its assets without a corresponding increase in the company's debt, the creditors' equity cushion increases as the creditors enjoy greater

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[157] Mark Hulbert, *Apple's Huge Stock Buyback Proves One Thing: Companies Are Lousy Market Timers*, MARKETWATCH (June 29, 2024, 10:20 AM), https://www.marketwatch.com/story/apples-huge-stock-buyback-proves-one-thing-companies-are-lousy-market-timers-914ec60a ("All told since Apple began repurchasing its shares in 2012, it has spent more than $800 billion on buybacks.").

[158] *See* Investor Relations, *Dividend History*, APPLE, https://investor.apple.com/dividend-history/default.aspx (last visited Jan. 26, 2026).

[159] Hulbert, *supra* note 157. *See also* Mrinalini Krishna, *Apples Beat Its Own Record with a Blockbuster Buyback,* INVESTOPEDIA (May 3, 2024, 3:17 PM), https://www.investopedia.com/apple-beat-its-own-record-with-blockbuster-buyback-plan-8643249#:~:text=Apple%20Inc.,at%202:50%20p.m.%20Eastern; Naomi Buchanan, *Apple Stock Jumps on Better-Than-Expected Earnings, $110 Billion Buyback Program*, INVESTOPEDIA (May 2, 2024, 8:38 PM), https://www.investopedia.com/apple-q2-fy-2024-earnings-8642625.

[160] Easterbrook, *supra* note 11, at 650.

[161] Easterbrook, *supra* note 11, at 655.

security than the amount for which they originally contracted.[162] When this happens, the residual claimants (shareholders) end up paying an interest rate that is "unwarranted"[163] because it no longer reflects either the current risk facing its creditors or the original bargain between the company and those creditors.

Like dividend payments, share repurchases reduce equity and may also involve the issuance of new debt and both of these effects benefit shareholders by restoring the original bargain that the company had with its creditors. Thus, share repurchases and dividend payments restore a company's debt/equity ratio to a level that is "appropriate to the creditors' risk."[164] Likewise, share repurchases, like dividend payments adjustments, prevent shareholders from unintentionally transferring wealth to bondholders and helps maintain a balanced financial structure.

Thus, like dividend payments, share repurchases serve as a valuable corporate mechanism for reducing agency costs and improving corporate governance. Firms with consistent dividend or share repurchase policies likely benefit from better monitoring by capital market participants and from removing cash from the control of managers who might not use it to benefit shareholders.

3. Agency costs of free cash flow

Like dividend payments, share repurchases ameliorate agency problems within a corporation by aligning the interests of managers with those of shareholders by reducing the amount of free cash flow available to managers. As Michael Jensen famously observed, managers may use excess cash for inefficient or self-serving purposes, such as pursuing projects with negative net present value or empire-building.[165] By distributing earnings to shareholders, payouts via repurchases or dividend payments limit the funds available for such activities, thereby reducing the potential for agency problems.

B. The Distinctive Advantages of Share Repurchases

1. Tax Advantages

In addition, in the U.S. and certain other jurisdictions, share repurchases are more tax efficient for shareholders because they receive more favorable tax treatment than dividend payments. Certain dividends are taxed as income, and even qualified dividends, which are taxed at capital gains rates still trigger immediate tax liability for the recipient. In

162 *Id.*
163 *Id.*
164 *Id.*
165 Jensen, *supra* note 4, at 323.

contrast, when a company repurchases its shares, shareholders only incur tax if they sell shares and realize a capital gain. Moreover, capital gains can be deferred indefinitely, and the step-up in basis that shareholders receive at death can eliminate tax entirely.[166]

2. Share Repurchases and Options Compensation

In a seminal contribution to the literature on the trade-offs involved in the decision about whether to repurchase shares or to pay dividends, Christine Jolls identified an increase in share repurchases beginning in the late 1970s and linked it to the increased use of stock options to compensate top executives.[167] Professor Jolls observed that the rise of stock options as a component of executive compensation incentivizes managers to prefer repurchases over dividends because dividend payments dilute the per-share value of the issuer's stock which depresses option value, while repurchases do not. Jolls found that firms with higher levels of executive stock options are significantly more likely to engage in stock repurchases compared to firms with fewer options.

Jolls rightly highlights the importance of agency theory in understanding corporate payout decisions and indicates that managers' interest in maximizing their compensation by increasing the value of their options could motivate managers to favor repurchases over dividend payments and to incentivize repurchases even when such repurchases might not be the best course of action for a company. Of course, if share repurchases increase stock prices, then they benefit the shareholders of the company as well as the executives of the company making the repurchases. As such, they are not manipulative.

Similarly, Jolls recognizes that stock-based compensation, particularly stock options, aligns managers' financial interests with those of shareholders. Managers with stock options benefit from an increase in the stock price, which incentivizes them to make decisions that maximize shareholder value.

3. The "Stickiness" of Dividends and the "Non-Stickiness" of Share Repurchases

In addition to their tax advantages, share repurchases offer a more flexible way of returning cash to shareholders because they are more

[166] Jennifer L. Blouin, Jana S. Erickson & Edward L. Maydew, *Taxes and the Choice of Organizational Form*, 52 J. ACCT. & ECON. 91 (2011) (explaining tax advantages of capital gains relative to dividends).

[167] Christine Jolls, *Stock Repurchases and Incentive Compensation* (Nat'l Bureau of Econ. Rsch., Working Paper No. 6467, 1988), http://www.nber.org/papers/w6467. Jolls found that stock repurchases rose from 7.1% of total cash distributions in 1975-1979 to 25.6% in 1992-1996.

discretionary: Firms can repurchase when they have excess cash and then pause repurchases when cash is tight. This flexibility is particularly valuable for companies whose earnings are volatile.

On the other hand, as Jolls observes, dividends might well be viewed as a stronger signal of a firm's financial health and future earnings prospects than share repurchases because dividends are typically more costly due to tax implications, and firms are generally reluctant to reduce or eliminate dividends once they are established.[168] As a result, increasing dividends can better signal confidence in stable and strong future cash flows than share repurchases. Similarly, dividends, unlike share repurchases, provide a predictable and regular income stream for shareholders, which can be particularly appealing to investors seeking steady returns, such as retirees or income-focused investors. Share repurchases, on the other hand, are often irregular and may not provide the same level of reliability.

4. Optimistic Shareholders with Heterogeneous Views About Share Value

Another possible advantage of dividends over share repurchases is that when companies make a dividend payment, there is no need for them to assess whether its stock is undervalued or overvalued because the dividend payment is distributed to all shareholders. On the other hand, share repurchases require companies to make sometimes difficult judgments about share valuations, and sometimes companies harm shareholders by overpaying for the shares they repurchase. For example, in the third quarter of 2011, JPMorgan Chase repurchased $4.4 billion of its own shares only to see a subsequent third quarter drop in the share price of 26 percent.[169]

The drop in the share price following the repurchase meant that the repurchase could have been done much less expensively by waiting. It also meant that the repurchase diluted the value of the shares that were not repurchased. JPMorgan Chase CEO Jamie Dimon apologized for the timing of the repurchase, saying that he was "sorry" and that "[i]t would have been wiser to wait."[170]

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[168] *See* Jolls, *supra* note 167, at 5, *citing* T.A. Marsh, T.A. Robert C. Merton & Robert C. Merton, *Dividend Behavior for the Aggregate Stock Market*, 60 J. BUSINESS 40 (1987).

[169] Samantha Bharatwaj, "Dimon Says 'Sorry' for Buyback Screwup," THESTREET (Oct. 13, 2011, 12:13 PM), https://www.thestreet.com/investing/stocks/dimon-says-sorry-for-buyback-screw-up-11276957.

[170] *Id.*

On the other hand, because corporations have access to all information, including material nonpublic information about how the firm is performing, and very good information about what the company's prospects are, such missteps should be rare. And, in light of the fact that companies are of the view, often correctly, that the market undervalues their shares, share repurchases are an important mechanism of market efficiency.

Another distinction between dividends and repurchases is that dividends do not alter the ownership structure of the company. While this is preferable when shareholders want to maintain their proportional ownership in the company, it often is the case that at least some shareholders will welcome the opportunity to sell their interest in the company.

Moreover, shareholders are a diverse group, and such heterogeneity inevitably will express itself in differing views among the shareholder population of a particular company about the value of that company's shares. Such heterogeneity provides a new, and, I believe, very strong argument in favor of share repurchases as the preferred mechanism for returning money to shareholders.

In this section of the Article, in the hope of conveying succinctly the distinctive benefit of share repurchases on a shareholder population with heterogeneous views about share values, I offer the following stylized hypothetical. This hypothetical is summarized in chart form in the Appendix.

Imagine a company with 50 shares of stock outstanding and two shareholders, "X" and "Y," each of whom owns 25 shares of stock. First, imagine that the company has no debt, and assets that are somewhat opaque and difficult to value. The value of the firm's stock will equal the present value of the earnings generated by the company's assets divided by the number of shares outstanding. Suppose that the company has assets that shareholder X values as generating a present value of $100, and shareholder Y values as generating a present value of $150.

At these valuations, X believes that the $100 value of the company results in a valuation of $2.00 per share because a $100 overall valuation translates into a per share valuation of $100 with 50 shares outstanding ($100/50 =$2.00). Likewise, Y's $150 valuation indicates that Y values the company's stock at $3.00 per share ($150/50=$3.00). Imagine that the current market price for the company's stock is $1.90 per share.

At this price, X and Y are unwilling to sell their shares because both think that the market is undervaluing their shares. Both shareholders are frustrated by the inability of the market to see the same value in their investment that they do.

I further hypothesize that the company's board of directors and management, who have the best window in to the company's performance and prospects, share the view that the company is undervalued. In fact, this group thinks that the company's stock is worth at least $3.00 per share and possibly a lot more. Suppose that the company offers to repurchase 25 of its shares at a price of $2.25 per share, or a total expenditure of $56.25 (25 X $2.25). At this price, X is willing to sell all of her shares back to the company because the company is offering her a $0.25 premium over what she thinks those shares are worth. On the other hand, Y is unwilling to sell her shares because the company's repurchase offer is $0.75 less than Y thinks they are worth.

After the share repurchase, Y revalues the company at a lower, $93.75 valuation because Y adjusts her $150 pre-repurchase valuation downward to $56.25 to reflect the $56.25 spent to repurchase X's shares. This, in turn, translates into a significant benefit for Y, because, after the repurchase, Y's new per share valuation is $3.75 per share, as the new asset value of $93.75 translates into a per share valuation of $3.75 when allocated over Y's 25 shares ($93.75/25 = $3.75).

Thus, the company's share repurchase benefits both the non-selling shareholder and the selling shareholder as it generates a 25 percent increase in share value for Y, the optimistic non-selling shareholder, and a 12.5% profit for X, the less optimistic shareholder who sells her shares back to the company in the repurchase.

V. Criticisms of Share Repurchases

Stock repurchases are blamed for increasing inequality by raising executive compensation at the expense of workers. Share repurchases often increase stock prices and they always reduce the number of outstanding shares. Reducing the number of outstanding shares increases earnings per share (EPS), which, in turn, often increases executive compensation because EPS is a common metric for determining bonuses and other elements of executive compensation.[171] Repurchases are

[171] A 2023 Report found that 46% of large U.S. companies use EPS or a similar measure as a metric in their executive compensation plans. *See* Clement Ma, Marizu Madu, Joadi Oglesby & Lane T. Gringlee, *Share Buybacks and Executive Compensation: Assessing Key Criticisms*, PAY GOVERNANCE (June 29, 2023) https://www.paygovernance.com/resource/share-buybacks-and-executive-compensation-assessing-key-criticisms/#:~:text=Buy%2DBacks%20and%20Incentive%20Compensation,about%20the%20use%20of%20adjustments (examining S&P 500 companies that effectuated share buybacks from 2018 to 2021 (561 companies) and finding "that 46% used per share metrics such as earnings per share (EPS) or cash flow per share in their executive short-term and/or long-term incentive

thought by some to reduce employment by diverting funds to shareholders that could and should be used to hire people. Share repurchases are also criticized for diverting funds to shareholders that should be used to increase the wages and benefits of a company's current workforce.

Stock repurchases also are blamed for harming companies by making companies more highly leveraged and therefore riskier. In addition, stock repurchases are said to reduce funds available for more worthwhile endeavors such as research and development (R&D). I show that these criticisms are inapt. Firms that engage in share repurchases do not reduce hiring rates, employee compensation, or environmental commitments. Similarly, repurchases do not lead to increases in under-funded pension liabilities or to higher CEO compensation.[172] In fact, repurchasing firms have better-funded pension plans compared to non-repurchasing firms, countering the criticism that repurchases harm employees' retirement benefits.

More importantly, I point out that regulating or even banning share repurchases is a bad idea because it would not even address, much less fix, any of the myriad problems attributed to them. Simply put, there is no reason to assume, as opponents of buybacks appear to do, that corporate funds not spent on buybacks somehow magically will be diverted to projects or causes championed by opponents of buybacks.

A. Repurchases Damage the Economy and/or Society-at-Large

The argument that stock repurchases harm society take a variety of forms. Chief among the criticisms appear to be that share repurchases exacerbate income inequality by benefitting wealthy shareholders and top executives at the expense of rank-and-file employees who would benefit if the money used to repurchase shares instead funded higher wages, better medical and retirement benefits, and more training.[173] The available empirical evidence indicates that this is not the case.

Iyer, John and Rao examine these claims and find no evidence that companies that repurchase their shares reduce hiring rates or employee compensation. In fact, repurchasing firms are associated with higher employee compensation, with some studies showing that repurchasing firms are associated with employee compensation that is 5 percent or

plans.").

[172] John, Iyer & Rao, *supra* note 113, at 25–28.

[172] *Id.* at 23.

[173] *Id.* at 6-11.

more higher than that of non-repurchasing firms,[174] and do not otherwise negatively impact employee compensation.[175]

Iyer, John and Rao also examine other employee-oriented corporate governance and social responsibility measures, such as profit-sharing, employee involvement, health and safety programs, and overall employee morale. They find that repurchasing firms score higher on these measures compared to non-repurchasing firms, providing further support for the conclusion that repurchases do not harm employee welfare.[176]

Similarly, there is no evidence that repurchasing firms neglect pension funding. On the contrary, Iyer, John and Rao's regression results show that repurchasing firms have better-funded pension plans compared to non-repurchasing firms.[177]

It also turns out, contrary to the contention of those opposed to share repurchases (and/or in favor of greater taxation or regulation of share repurchases) there is little evidence that stock repurchases are associated with higher CEO compensation or increased CEO-to-median worker pay ratios.[178] For example, in a regression whose dependent variable is the one period forward percent change in CEO compensation, Iyer, John and Rao find that the level of current year share repurchases are negatively related to future increases in CEO compensation.[179]

The use of the one period forward percent change in CEO compensation to measure the effect of share repurchases on CEO compensation is helpful because share repurchases can be used to help executives to obtain higher compensation because compensation is often linked to attaining earnings-per-share (EPS) goals, and repurchases boost earnings per share by lowering the number of shares outstanding without reducing earnings.[180]

Similarly, share repurchases are not strongly associated with higher CEO-to-median worker pay ratios.[181] The findings that share repurchases are not associated with increases in CEO compensation, and that there is no systematic evidence to support the claim that stock repurchases are associated with higher CEO compensation or increased CEO-to-median worker pay ratios,[182] are of particular interest in light of

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174 *Id.* at 23.
175 *Id.* at 22-23, tbl. 6, models 2, 3 and 4.
176 *Id.* at 14-15.
177 *Id.* at page 3, tbl. 8.
178 *Id.* at 27.
179 *Id.*, panel A.
180 *Id.*
181 *Id.* at 27.
182 *Id.* at 30.

the fact that opponents of share repurchases often make the claim that repurchases somehow contribute to the rising inequality in compensation between low-wage workers and higher-wage workers.[183]

It also turns out that repurchasing firms score higher on both employee-centric and environmentally-centric social responsibility indicators, suggesting that repurchases do not come at the expense of broader societal goals.[184] Relatedly, a final criticism of share repurchases is that they starve corporations of funding that would be better used internally to fund expansion or acquisitions. Professor Richard Booth has provided a complete answer to this concern with his observation that almost all (95%) of the funds distributed to shareholders in stock repurchases are reinvested by recipient stockholders in the shares of other public companies.[185] As Booth observes, most of the funds used to repurchase shares:

> go: (1) to newly public companies or existing public companies that issue additional shares or (2) to buy stock issued by existing public companies to acquire private companies (whose sellers sell the shares with which they are paid). And some of the money goes (3) to control for dilution caused by shares issued in connection with equity compensation.[186]

Of course, while the use of funds received by a stockholder in company "A" to buy stock in company "B" benefits company "B" and/or company B's shareholders, that does not address the question of whether repurchases negatively affect the prospects of the company that is making the share repurchase. That is the question to which this Article now turns.

B. Repurchases Don't Harm the Repurchasing Company

Like so many of the complaints about share repurchases, the claim that they harm the companies making such repurchases turns out to be inconsistent with the available evidence. One complaint is that firms that

183 *See* Communications Workers of America, *Stock Buybacks Hurt Workers,* *https://cwa-union.org/stock-buybacks-hurt-workers* (last visited Jan. 26, 2026). On the general subject of executive compensation and wage inequality, see Lawrene Misel & Julia Wolfe, *CEO Compensation has grown 940% Since 1978*, ECON. POL'Y INST. (Aug. 14, 2019), https://www.epi.org/publication/ceo-compensation-2018/.

184 John, Iyer & Rao, *supra* note 113, at 24–25.

185 Booth, *supra* note 2, at 87 (2023) ("almost all of the funds distributed by repurchase are reinvested by the recipient stockholders in the shares of other public companies.").

186 *Id.* at 87–88.

repurchase their shares are less resilient than other firms because they do not have liquidity reserves that might allow them to weather unanticipated firm or industry shocks or general market turbulence. This concern is not consistent with the data.

The article concludes that companies making share repurchases are resilient and do not compromise their financial health or ability to withstand economic shocks. Repurchasing firms actually have higher cash surplus levels, which makes them more resilient during financial crises or economic downturns. On average, repurchasing firms have a cash surplus of 9.3% of assets, compared to 8.09% for non-repurchasing firms.[187] In addition, when firms experience periods of financial stress, defined as a 25% drop in sales compared to the previous year, repurchasing firms reduce their repurchase activity and increase their cash surpluses, demonstrating responsible financial management.[188]

In fact, among firms experiencing a precipitous drop in sales, those companies that engaged in the most share repurchases maintained the highest cash surplus levels.[189] Firms engaging in the highest percentage of repurchases had cash surpluses averaging 14.6% of their assets during a sales drop, 24.7% in the year following the drop, and 21.9% two years after the drop.[190]

The cash surplus of firms making repurchases was significantly higher than the cash surplus of companies that did not make share repurchases in the years following business downturns as measured by significant declines in sales.[191] Thus, repurchasing firms have better cash surplus than firms that don't engage in stock repurchases, even during liquidity shocks.[192] This is a strong indication that repurchasing firms are financially robust and act responsibly.[193]

In sum, firms engaged in making share repurchases generally exhibit socially responsible behavior, maintain adequate cash reserves, and prioritize employee welfare and social responsibility. The criticisms that repurchases harm firm resiliency, employee welfare, or long-term investments are not supported by the empirical evidence.

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[187] John, Iyer & Rao, *supra* note 113, at 17.
[188] *Id.* at 18.
[189] *Id.* at 19.
[190] *Id.* at 19.
[191] *Id.* (among the "no repurchase" firms, the cash surplus showed increases from 1% to 9.82% and to 10.99% in the two years following the sales decline).
[192] *Id.*
[193] *Id.* at 21.

CONCLUSION

This Article explains the central role of stock repurchases in modern corporate finance, argues that the regulatory constraints on repurchases imposed by SEC Rule 10b-18 reflect bad public policy, and advocates for the reform or repeal of that Rule. Share repurchases are an important tool for effectuating good corporate governance and have distinct advantages over dividend payments that go far beyond mere tax advantages.

SEC Rule 10b-18, while providing a safe harbor for issuers, imposes overly restrictive conditions that hinder companies from effectively repurchasing their shares. Specifically, the rule's price ceilings, volume limitations, timing restrictions, and single broker requirements are criticized for making repurchases predictable, vulnerable to exploitation by high-frequency traders, and less effective in achieving their intended benefits. Particularly in light of the fact that shareholders are generally optimistic about the prospects of the companies in which they have invested, the restrictions on the prices that repurchasers can pay for their company's stock are especially ill-advised.

The Article has shown that Rule 10b-18 likely is not as big a burden for the vary largest Mega Cap companies like Apple and Nvidia as it is for other companies. But it is a real deterrent for all the vast majority of the public company universe.

If replacing Rule 10b-18 with a general safe harbor for all repurchases cannot be achieved due to political opposition to share repurchases, then at a minimum, the Rule should be reformed to allow repurchases at the midpoint of the National Best Bid and Offer (NBBO).

In this Article, I challenge the perceived notion that share repurchases are inherently manipulative or harmful to market integrity. Repurchases do not involve any of the traditional forms of market manipulation such as wash sales or matched orders. There is no empirical evidence to suggest that repurchases are used to manipulate stock prices or to inflate executive compensation. Instead, repurchasing firms are shown to be financially robust, socially responsible, and beneficial to both selling and non-selling shareholders.

A key theme of the article is the concept of shareholder heterogeneity and optimism. Shareholders of a company are generally more optimistic about its prospects than the broader investing population, and their optimism varies. This heterogeneity creates a downward-sloping demand curve for the company's shares, as less optimistic shareholders are more likely to sell their shares at a premium, while more optimistic shareholders retain their shares and benefit from increased ownership stakes and future profit distributions. Share repurchases, unlike dividends, can cater to this heterogeneity by allowing less optimistic shareholders to exit at a premium while simultaneously benefiting non-selling shareholders through accretive ownership. In light of this heterogeneity, repurchases have a win-win characteristic that dividend payments do not.

Appendix

Figure 1. Corporation's Balance Sheet Before Share Repurchase

Assets	Liabilities and Share Value
Assets: (Y's estimation) $150 Assets (X's estimation): $100	Liabilities: $0.00
	Share value (Y's estimation) $3.00 Share value (X's estimation) $2.00

Figure 2. Corporation's Balance Sheet After Share Repurchase

Assets	Liabilities and Share Value
Assets: (Y's estimation) $93.75	Liabilities: $0.00
	Share value (X's estimation) $0.00 X has $2.35 in cash. Share value (Y's estimation) $3.75

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