

June 25, 2019

Brent J. Fields
Secretary
U.S. Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Petition for Rulemaking to Revise Rule 10b-18

Dear Mr. Fields:

Petitioners signed below respectfully submit this petition for rulemaking pursuant to Rule 192(a) of the Commission's Rules of Practice.

In 1982, the Securities and Exchange Commission ("SEC" or "Commission") finalized Rule 10b-18, 17 C.F.R. § 240.10b-18, ("Rule 10b-18" or "the Rule"). Rule 10b-18 provided companies with a "safe harbor" to undertake stock repurchase (or "buyback") programs without being subject to liability for manipulation under the Securities and Exchange Act of 1934. Stock repurchase programs have grown in size and importance since Rule 10b-18 went into effect. In particular, the use of the practice skyrocketed after the enactment of President Trump's Tax Cuts and Jobs Act. The tax bill provided significant tax benefits to large corporations, such as a lower corporate tax rate and an incentive to repatriate offshore cash, and led to a 64 percent increase in stock repurchases while real wages for workers remained flat. Indeed, analysts estimate that in 2018 corporations used nearly 60 percent of their corporate tax cut to repurchase stock. In other words, at a time when wages for average workers have failed to keep up with inflation, corporations have used the corporate tax break to collectively pay \$1 trillion to executives, boards of directors, and large share sellers. Instead firms could dedicate this capital to worker wages, training, hiring, and other investments necessary for innovation and growth.

The impact of the Tax Cuts and Jobs Act makes clear that repurchase programs under Rule 10b-18 are subject to significant abuse. The Rule's safe harbor conditions—which firms must meet to benefit from its protection from manipulation charges—have failed to prevent executives from using repurchases to boost a company's stock price or meet other performance goals at the expense of investing in its workers. And the inadequate disclosure requirement in Rule 10b-18 frustrates oversight by investors and the Commission. The SEC now has the opportunity to address these recently heightened concerns. Petitioners therefore respectfully requests the Commission initiate a rulemaking to revise Rule 10b-18 to curb manipulative practices by firms and encourage corporations to fairly compensate American workers.

Petitioners are organizations with a vested interest in promoting investor protection, sound capital formation and a strong, stable, and ethical financial system.

I. Background

Under the Securities and Exchange Act, it is unlawful “[t]o effect, alone or with 1 or more other persons, a series of transactions in any security [...] creating actual or apparent active trading in such security, or raising or depressing the price of such security, for the purpose of inducing the purchase or sale of such security by others.” 15 U.S.C. § 78i(a)(2).¹ On the face of the Act, a stock or share repurchase, where a firm buys its own stock, could open a firm to charges of market manipulation. Such a repurchase generates trading activity, decreases outstanding shares, increases the stock price — and is often announced explicitly for this purpose.²

In 1982, the SEC enacted Rule 10b-18, which provides a “safe harbor” from liability for manipulation under the Securities and Exchange Act if a firm performs its stock repurchase consistent with the conditions of the Rule. At the time of its enactment, consistent with the anti-manipulation provisions of the Securities and Exchange Act, the Commission intended what became the Rule to be “a scheme of regulation that limits the ability of an issuer *** to control the price of the issuer’s securities.”³

The conditions of the Rule concern the volume, manner, price, and timing of a repurchase.⁴ Failure to conform to the conditions of the safe harbor “remove[s] all of the issuer’s repurchases from the safe harbor for that day.” *Id.*, Preliminary Note. The safe harbor also “is not available for repurchases that, although made in technical compliance with the section, are part of a plan or scheme to evade the federal securities laws.” *Id.*

The adoption of Rule 10b-18 represented a sea change in corporate finance, after which stock repurchases became more common. Prior to its adoption, repurchase programs were relatively rare due to the threat of a manipulation charge; after the Rule took effect, the

¹ See also 17 C.F.R. § 240.10b-5 (it is “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, (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.”).

² William Lazonick, *Profits without Prosperity*, Harvard Business Review (Sept. 2014), <https://hbr.org/2014/09/profits-without-prosperity>.

³ SEC, Equity Securities: purchases by issuer and others, 45 Fed. Reg. 209 (October 27, 1980).

⁴ For example, to remain within the safe harbor, a firm generally may not use more than one broker during any given day, execute repurchases during the first or last 30 minutes of trading, or execute repurchases that exceed 25 percent of the average daily trading volume for that security. 17 C.F.R. § 240.10b-18(b). The firm must also disclose repurchases on quarterly reports. *Id.*

aggregate value of stock repurchases rose significantly.⁵ Now, many firms allocate nearly all their profits (net income) to repurchases and other forms of shareholder compensation rather than reinvesting in the productive capabilities of the firm.⁶ For the 449 publicly listed companies in the S&P 500 between 2003 and 2012, 97 percent of profit went to shareholders—with 54 percent of profit used for repurchases.⁷ This is fungible capital that could be retained by the corporation to be used elsewhere, including worker wages, training, hiring, and other investments necessary for innovation and growth.⁸

II. Specific Concerns with Current Rule 10b-18

Despite Rule 10b-18's ostensible limits on the scope of the safe harbor, the history of stock repurchases—exacerbated by the recent effects of the Tax Cuts and Jobs Act—shows that the Rule has failed to meet the purpose behind its promulgation: limiting the ability of the firm to manipulate its stock price and volume. Specifically, firms retain the ability to artificially inflate stock prices or meet performance goals through repurchases that benefit executives without corresponding improvements to the real value of the firm. This manipulative redirection of capital comes in part at the expense of American workers.

A. *Executives retain a strong financial incentive to use repurchases to artificially inflate stock prices and boost their own compensation without real firm improvement.*

Rule 10b-18's safe harbor neither prevents firms from manipulating stock prices and volume through repurchase on the open market,⁹ nor guards against the strong personal financial incentive for executives to do so.

Stock repurchase programs artificially increase stock prices without altering the real value of the firm, or achieving improvements in profit, the quality of goods, customer relations, or efficiency.¹⁰ Repurchases decrease the availability of stock supply on the open market,

⁵ Gustavo Grullon and Roni Michaely, Dividends, *Share Repurchases, and the Substitution Hypothesis*, 57 *The Journal of Finance* 1649 (Aug. 2002), <http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.538.6732&rep=rep1&type=pdf>.

⁶ William Lazonick, *Profits without Prosperity*, *Harvard Business Review* (Sept. 2014), <https://hbr.org/2014/09/profits-without-prosperity>.

⁷ *Id.*

⁸ See, e.g., William Lazonick et al., *Skill Development and Sustainable Prosperity: Cumulative and Collective Careers versus Skill-Biased Technical Change*, Institute for New Economic Thinking (Working Paper No. 15) (Dec. 2014), <https://www.ineteconomics.org/research/research-papers/skill-development-and-sustainable-prosperity-cumulative-and-collective-careers-versus-skill-biased-technical-change>.

⁹ Though there are various methods a firm could use to repurchase shares, firms overwhelmingly favor open market transactions. Other methods, such as tender offers, are different from the open market transactions described here and may not raise the same concerns.

¹⁰ Supporters of repurchase programs point to non-manipulative uses, such as signaling confidence, offsetting stock dilution, and returning unproductive capital to shareholders, to justify Rule 10b-18.

increasing the value of each available share. The SEC has recognized the intent and effect of repurchases, noting that repurchases are often used “[d]uring mergers and acquisitions *** to support or raise the market price of the issuer’s securities for the purpose of making exchange ratios appear more favorable to target company security holders,” as well as “[a]fter mergers and acquisitions, *** to support or raise the market price of the issuer’s securities for the purpose of reducing the number of shares required to be issued pursuant to contingent obligations owed to former shareholders of the target company.”¹¹ The mere announcement of repurchases, even without execution by the firms, has been shown to have a positive effect on a business’s stock price.¹²

Rule 10b-18 also does not address the strong financial incentive of executives to use these effects of repurchases to increase their own compensation. The SEC intended Rule 10b-18 to prevent abusive “purchases designed to support the price of the issuer’s securities in order to assist inside[r]s in disposing of their holdings at or above the pegged price.”¹³ But the Rule has not kept up with the times. First, in today’s market, the majority of executive compensation is often performance-based, tied to stock price or earnings per share.¹⁴ This presents executives with a direct, personal financial incentive to increase the short-term stock price or decrease the volume of outstanding shares to meet performance goals. Repurchase programs offer a direct lever to achieve those goals.¹⁵ Indeed, empirical analysis of firm behavior has revealed that the likelihood of repurchases is higher at firms that would have just missed analyst earnings expectations without the effect of the repurchase.¹⁶ This strongly suggests that firm executives rely on repurchases to meet earnings targets and thus increase their own performance-based compensation. Rule 10b-18 does not account for the incentives for executives to use repurchases to increase their own compensation.

For an analysis of why these justifications are unpersuasive in the main run see Lazonick 2014, fn. 6 *supra*.

¹¹ SEC, Purchases of Certain Equity Securities by the Issuer and Others, 45 Fed. Reg. 70890, 70892 (Oct. 27, 1980).

¹² Beverly Kracher and Robert R. Johnson, *Repurchase Announcements, Lies and False Signals*, 16 *Journal of Business Ethics* 1677 (Nov. 1997), <https://link.springer.com/article/10.1023/A:1017968003026>.

¹³ SEC, Purchases of Certain Equity Securities by the Issuer and Others, 45 Fed. Reg. 70890, 70892 (Oct. 27, 1980).

¹⁴ David F. Larcker and Brian Tayan, *CEO Compensation Data Spotlight*, Stanford Graduate School of Business Corporate Governance Research Institute, <https://www.gsb.stanford.edu/sites/gsb/files/publication-pdf/cgri-quick-guide-17-ceo-compensation-data.pdf>.

¹⁵ Ahmet C. Kurt, *Managing EPS and Signaling Undervaluation as a Motivation for Repurchases: The Case of Accelerated Share Repurchases*, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2255203&download=yes.

¹⁶ Heitor Almeida, Vyacheslav Fox, & Mathias Kronlund, *The Real Effects of Share Repurchases*, 119 *J. of Financial Economics* 168 (2016), https://econpapers.repec.org/article/eeejfinec/v_3a119_3ay_3a2016_3ai_3a1_3ap_3a168-185.htm.

Second, research by Commissioner Robert Jackson has revealed that executives often time the sale of their personal equity to take advantage of the price increase created by repurchases and their announcement.¹⁷ In half of the repurchase programs in the study, at least one executive at the repurchasing firm sold shares in the month following the announcement. During each of the eight days following an announcement, executives are twice as likely to sell shares as any other day and sell on average five times the volume of stock. As executives are not required to disclose their trading intentions to shareholders in advance of a repurchase program, shareholders are less able to scrutinize repurchase programs for conflicts of interest.

The lack of effective disclosures also obscures whether repurchase programs conform with the conditions of the Rule 10b-18 safe harbor. Firms disclose quarterly information about repurchase programs, but only after the fact and tabulated by month. The Commission therefore cannot effectively compare firm repurchase activity (reported by month) against the daily conditions, such as the daily limit on repurchase volume, of the safe harbor.¹⁸ As then-Chair of the Commission Mary Jo White recognized, “data analyses for issuer stock repurchases presents significant challenges because detailed trading data regarding repurchases is not currently available.”¹⁹ Addressing that challenge is within the power of the SEC.

B. The Tax Cuts and Jobs Act of 2017 exacerbated the harm to worker wages caused by repurchase programs.

When firms use stock repurchase programs to “downsize-and-distribute” capital to executives and shareholders for short-term gain rather than “retain[ing]-and-reinvest[ing]”

¹⁷ Speech by Robert J. Jackson Jr., Stock Buybacks and Corporate Cashouts (June 11, 2018), <https://www.sec.gov/news/speech/speech-jackson-061118>. In addition to Commissioner Jackson, Chair Jay Clayton and Commissioner Hester Pierce have indicated support for a review of Rule 10b-18 as have a number of Senators. See Letter from 21 Senators to Chair Clayton (June 28, 2018); see also Dylan Scott and Emily Stewart, *Marco Rubio’s plan to fix the GOP tax cuts starts with stock buybacks*, Vox (Feb. 20, 2019), <https://www.vox.com/policy-and-politics/2019/2/20/18225086/marco-rubio-stock-buybacks-tax-plan>; Chuck Schumer and Bernie Sanders, *Schumer and Sanders: Limit Corporate Stock Buybacks*, New York Times (Feb. 3, 2019), <https://www.nytimes.com/2019/02/03/opinion/chuck-schumer-bernie-sanders.html>.

¹⁸ William Lazonick, *Profits without Prosperity: How Stock Buybacks Manipulate the Market, and Leave Most Americans Worse Off* at 10 (April 2014), https://www.ineteconomics.org/uploads/papers/LAZONICK_William_Profits-without-Prosperity-20140406.pdf.

¹⁹ Letter from SEC Chair Mary Jo White to Senator Tammy Baldwin (July 13, 2015), <https://www.documentcloud.org/documents/2272283-sec-response-to-baldwin-07132015.html#document/p1>.

in the firm for longer term innovation and growth,²⁰ workers often lose out in the process.²¹ The Tax Cuts and Jobs Act handed companies a massive tax windfall that many used in exactly that way with precisely that result.

The Tax Cuts and Jobs Act became law in December 2017 and provided significant tax benefits to large corporations,²² such as a lower corporate tax rate and an incentive to repatriate offshore cash.²³ As a result, firms enjoyed a windfall worth hundreds of billions of dollars.²⁴ But instead of raising wages as promised by the Trump Administration during the debate over the tax bill,²⁵ firms raced to repurchase their own stock. In 2018, the first full year after the tax cut, repurchases surged 64 percent over the previous year and topped \$1 trillion overall.²⁶ Yet real wages for typical workers remained flat.²⁷ A survey of top firms revealed that only 7 percent of the tax windfall will go to workers, while almost 60 percent will be paid to shareholders.²⁸

²⁰ William Lazonick, *Stock buybacks: From retain-and reinvest to downsize-and-distribute*, Brookings (April 2015), <https://www.brookings.edu/wp-content/uploads/2016/06/lazonick.pdf>;

²¹ See generally Lenore Palladino, *Stock Buybacks: Driving a High-Profit, Low-Wage Economy* (2018), <http://rooseveltinstitute.org/stock-buybacks-high-profit-low-wage/>.

²² H.R. 1 An Act to provide for reconciliation pursuant to titles II and V of the concurrent resolution on the budget for fiscal year 2018, <https://www.congress.gov/bill/115th-congress/house-bill/1>.

²³ Sidney Kess, *The Tax Cuts and Jobs Act: Impact on Businesses*, The CPA Journal (Dec. 2018), <https://www.cpajournal.com/2018/12/13/icymi-the-tax-cuts-and-jobs-act-of-2017-impact-on-businesses/>.

²⁴ Matthew Gardner, *Morgan Stanley Report Confirms Tax Cut Promises Made are Promises Unkept*, ITEP (Dec. 7, 2018) (“companies have “brought back” about half a trillion dollars in 2018,”), <https://itep.org/morgan-stanley-report-confirms-tax-cut-promises-made-are-promises-unkept/>;

Howard Gold, *It's official: The Trump tax cuts were a bust*, MarketWatch (Feb. 2, 2019) (“corporate profits surged \$78.2 billion in the third quarter, accelerating over the second quarter’s \$65 billion gain”), <https://www.marketwatch.com/story/its-official-the-trump-tax-cuts-were-a-bust-2019-01-30>.

²⁵ Council of Economic Advisors, *Corporate Tax Reform and Wages: Theory and Evidence* (Oct. 2017), <https://www.whitehouse.gov/sites/whitehouse.gov/files/documents/Tax%20Reform%20and%20Wages.pdf>.

²⁶ Matt Egan, *Corporate America gives out a record \$1 trillion in stock buybacks*, CNN Business (Dec. 17, 2018), <https://www.cnn.com/2018/12/17/investing/stock-buybacks-trillion-dollars/index.html>.

²⁷ Patrick W. Watson, *Real Wage Growth Is Actually Falling*, Forbes (Sept. 25, 2018), <https://www.forbes.com/sites/patrickwwatson/2018/09/25/real-wage-growth-is-actually-falling/#1e7c07697284>.

²⁸ Just Capital, *The JUST Capital Rankings on Corporate Tax Reform*, <https://justcapital.com/reports/the-just-capital-rankings-on-corporate-tax-reform/>. As of February 2018, firms announced share repurchase programs 30 times greater than announced increases to employee compensation. See Matt Egan, *Tax cut scoreboard: Workers \$6 billion; Shareholders \$171 billion*, CNN Business (Feb. 16, 2018), <https://money.cnn.com/2018/02/16/investing/stock-buybacks-tax-law-bonuses/index.html>; Rick Wartzman and William Lazonick, *Don't let pay increases coming out of tax reform fool you*, Washington Post (Feb. 6, 2018) (“our analysis finds that major corporations are planning to spend more than 30 times what they are putting in the wallets of employees on buying back their own stock — a practice solely meant to lift the fortunes of shareholders.”), https://www.washingtonpost.com/opinions/dont-let-pay-increases-coming-out-of-tax-reform-fool-you/2018/02/06/1271905a-06a6-11e8-94e8-e8b8600ade23_story.html?noredirect=on&utm_term=.d70f49c4a81c.

Several examples illustrate how corporations have used the Tax Cuts and Jobs Act to reward executives and large shareholders at the expense of workers:

- **Walmart authorized \$20 billion for stock repurchases in 2018 and 2019, enough money to give 1 million employees a \$10,000 raise.** Walmart is America's largest corporate employer, with an \$11 per hour, or \$19,448 per year, starting wage in many states.²⁹ Its CEO, Doug McMillon, earned nearly \$24 million last year—1,076 times the pay of the median worker at Walmart.³⁰ Despite this disparity, Walmart authorized \$20 billion for stock repurchases in 2018 and 2019. By contrast, Walmart's announcement of a one-time bonus for employees of up to \$1,000 per worker is expected to total just 0.02 percent of the money distributed to shareholders through repurchases. According to an analysis by the Roosevelt Institute, had Walmart reallocated those repurchase funds to workers, it could have raised 1 million hourly workers' wages by \$5.66/hour for the year. That could bring Walmart's starting wage to over \$16.00/hour, an extra \$10,000 per year for a full-time worker. Alternatively, the retail giant could have used the funds to retain some of the thousands of workers laid off in 2018.³¹
- **In October 2018, Sears Holding Company, which owns Sears and Kmart, filed for bankruptcy with about \$5.6 billion in outstanding debt³² after having spent \$6 billion on stock repurchases since 2005.³³** Rather than investing in the firms' core retail business,³⁴ Sears opted for bankruptcy after years of layoffs and store closures by firm management amidst massive stock repurchases. When Sears and Kmart combined in 2005, they had approximately 3,500 stores and

²⁹ See generally, Lenore Palladino and Adil Abdela, Making the Case: How Ending Walmart's Stock Buyback Program Would Help to Fix Our High-Profit, Low-Wage Economy (May 22, 2018), <http://rooseveltinstitute.org/making-case/>.

³⁰ Nathaniel Meyersohn, *Walmart CEO's total pay was nearly \$24M last year*, CNN (April 23, 2019), https://www.cnn.com/2019/04/23/business/walmart-ceo-doug-mcmillon-pay-retail/index.html?utm_source=twCNN&utm_medium=social&utm_content=2019-04-24T01%3A39%3A21&utm_term=image.

³¹ Tonya Garcia, *Wal-Mart has announced thousands of layoffs since publicizing bonuses and benefits expansion*, MarketWatch (Feb. 1, 2018), <https://www.marketwatch.com/story/wal-mart-has-announced-thousands-of-layoffs-since-publicizing-bonuses-and-benefits-expansion-2018-01-30>.

³² Gaby Del Valle, *Sears has filed for bankruptcy, but that doesn't mean it's shutting down*, Vox (Oct. 15, 2018), <https://www.vox.com/the-goods/2018/10/15/17979016/sears-chapter-11-bankrupt-eddie-lampert-esl-investments>.

³³ Chris Isodore, *How Sears wasted \$6 billion that could have kept it out of bankruptcy*, CNN (Oct. 30, 2018), <https://www.cnn.com/2018/10/30/business/sears-share-repurchase/index.html>.

³⁴ Gretchen Morgenson, *At Sears, Those Big Losses Get in the Way*, New York Times (Nov. 2, 2013) ("In 2012, for instance, Sears Holdings spent \$1.46 per square foot, on average, on its stores. Five of its peers — J.C. Penney, Target, Lowe's, Walmart and Home Depot — spent an average of \$9.45 a square foot."), <https://www.nytimes.com/2013/11/03/business/at-sears-those-big-losses-get-in-the-way.html>.

over 300,000 employees.³⁵ Sears shuttered 700 stores between 2016 and 2018 alone.³⁶ As of last year, only about 1,000 stores and 89,000 employees remained.³⁷ Store closures and employee layoffs have continued since the bankruptcy announcement.³⁸

- **Wells Fargo authorized more than \$40 billion in stock repurchases since President Trump’s tax bill was passed despite continuing to lay off workers across the country.** In September 2018, Wells Fargo announced that it intends to lay off between 5 and 10 percent of its workforce, or 13,250 to 26,500 employees, over the next three years.³⁹ It began the process by laying off 1,636 employees in 2018.⁴⁰ Yet Wells Fargo expended over \$20 billion on share repurchases in 2018, a 108% increase over the previous year.⁴¹ And between the passage of President Trump’s tax bill and November 2018, Wells Fargo authorized \$40.6 billion in future stock repurchases.⁴² Although Wells Fargo has claimed the layoffs are part of efforts to make the firm “more streamlined and efficient”⁴³ by eliminating \$4 billion in expenses,⁴⁴ the then-CEO has explained that the repurchases are driven by an

³⁵ Chris Isidore, *Sears’ moment of truth is coming*, CNN (Feb. 5, 2019), <https://www.cnn.com/2019/02/02/business/sears-decision/index.html>.

³⁶ John W. Schoen et al., *This map shows all the locations Sears once operated and what it has left today*, CNBC (Oct. 15, 2018), <https://www.cnbc.com/2018/10/15/sears-is-closing-another-142-stores-heres-a-map-of-the-locations-it-has-left.html>.

³⁷ Madison Freeman, *Sears to keep closing stores even if it survives bankruptcy*, WGN (Feb. 6, 2019), <https://wgntv.com/2019/02/06/sears-to-keep-closing-stores-even-if-it-survives-bankruptcy/>.

³⁸ See, e.g., John W. Schoen et al., *Here is a map of the 142 Sears and Kmart stores set to close*, CNBC (Oct. 15, 2018), <https://www.cnbc.com/2018/10/15/here-is-a-map-of-the-142-sears-and-kmart-stores-set-to-close.html>; Lauren Thomas and Lauren Hirsch, *Sears to shut 40 more stores early next year*, CNBC (Nov. 8, 2018), <https://www.cnbc.com/2018/11/08/sears-to-shut-40-more-stores-early-next-year.html>; Lauren Thomas, *Sears closing 80 more stores in March as it faces possible liquidation*, CNBC (Dec. 28, 2018), <https://www.cnbc.com/2018/12/28/sears-closing-80-more-stores-in-march-faces-possible-liquidation.html>.

³⁹ Kate Rooney, *Wells Fargo plans to cut up to 10% of workforce in the next 3 years*, CNBC (Sept. 20, 2018), <https://www.cnbc.com/2018/09/20/wells-fargo-plans-to-lower-headcount-by-up-to-10percent-in-next-3-years.html>.

⁴⁰ Committee for Better Banks, *Promoting Economic Inequality at Six MegaBanks* (April 2019), <https://betterbanks.org/wp-content/uploads/2019/04/Promoting-Economic-Inequality-at-Six-Megabanks.pdf>.

⁴¹ *Id.*

⁴² Lenore Palladino, *What Wells Fargo’s \$40.6 Billion in Stock Buybacks Could Have Meant for Its Employees and Customers*, Roosevelt Institute (Nov. 7, 2018), <http://rooseveltinstitute.org/what-wells-fargos-40-6-billion-stock-buybacks-could-have-meant-its-employees-and-customers/>.

⁴³ News Release, *As Wells Fargo Transforms to Meet Customer Needs and Improve Operational Excellence, Company to Be More Efficient*, Wells Fargo, (Sept. 20, 2018), <https://newsroom.wf.com/press-release/corporate-and-financial/wells-fargo-transforms-meet-customer-needs-and-improve>.

⁴⁴ Ross Kerber, *Wells Fargo on track for \$4 billion in expense reductions*, St. Louis Post-Dispatch (May 10, 2018), https://www.stltoday.com/business/local/wells-fargo-on-track-for-billion-in-expense-reductions/article_666a5e19-9395-58df-8882-70208d9f66f7.html.

“excess of capital” at the firm.⁴⁵ According to an analysis by the Roosevelt Institute, if Wells Fargo invested the same \$40.6 billion in its workers, instead of authorizing a stock repurchase, the company could have provided each of its 262,700 employees a raise of \$154,000.⁴⁶ Or if Wells Fargo had saved only one-tenth of the \$40.6 billion that it authorized for spending on stock repurchases, all the positions it plans to eliminate could be saved.⁴⁷

- **AT&T reaped over \$20 billion from the tax cuts and has spent billions on buybacks while continuing to outsource jobs.** AT&T vocally supported the tax cuts, which increased its cash profits by \$ 3 billion annually and reduced tax liabilities by another \$ 20 billion.⁴⁸ But despite proclaiming itself a job-creator,⁴⁹ during 2018 alone AT&T eliminated 10,700 union jobs and closed call centers,⁵⁰ continuing a previous seven-year trend that has resulted in 44 closed call centers and 16,000 laid off call center workers nationwide.⁵¹ These layoffs come amidst record stock repurchases by AT&T. The company, which has spent \$16.45 billion on stock buybacks since 2013, spent more on buybacks in the second quarter of 2018 than it has spent in any quarter since 2004.⁵²

The tendency toward repurchase programs at the expense of workers is of a piece with a faulty program of short-term shareholder primacy. The management theory of shareholder primacy relies on the false presumption that firms should maximize immediate shareholder value without regard for other stakeholders, like workers and others with long-term

⁴⁵ Lydia DePillis, *Why Wells Fargo could be one of tax reform's big winners*, CNN (Dec. 18, 2018) (““Is it our goal to increase return to our shareholders and do we have an excess amount of capital? The answer to both is, yes,” Sloan said. “So our expectation should be that we will continue to increase our dividend and our share buybacks next year and the year after that and the year after that.””), <https://money.cnn.com/2017/12/18/news/economy/wells-fargo-taxes/index.html>.

⁴⁶ Palladino 2018, fn. 42 *supra*.

⁴⁷ *Id.*

⁴⁸ Communications Workers of America, AT&T 2018 Jobs Report 1 (Jan. 2019), <https://cwa-union.org/sites/default/files/201901-att-offshoring-report.pdf>.

⁴⁹ *Id.* (CEO Randall Stephenson said in support of the bill that “If the House bill is signed into law, we’d commit to increasing our domestic investment by \$1 billion in the first year in which the new rates are in place. And research tells us that every \$1 billion in capital invested in telecom creates about 7,000 good jobs for the middle class,” and “[f]rom my standpoint, the driver of this is the business tax reform... if we get investment going, we get productivity going, we get wage gain going, we invest another billion dollars. Every billion dollars AT&T invests is 7,000 hard hat jobs. These are not entry-level jobs. These are 7,000 jobs of people putting fiber in the ground, hard hat jobs that make \$70,000 to \$80,000 per year.”).

⁵⁰ *Id.*

⁵¹ *Id.*; Michael Sainato, 'They're liquidating us': AT&T continues layoffs and outsourcing despite profits, *The Guardian* (Aug. 28, 2018), <https://www.theguardian.com/us-news/2018/aug/28/att-earnings-record-profits-layoffs-outsourcing-continue>.

⁵² Sainato 2018, fn. 51 *supra*.

interests.⁵³ As described by Blackrock CEO Larry Fink, shareholder primacy can emphasize short-term returns over re-investment, “sacrifice investments in employee development, innovation, and capital expenditures that are necessary for long-term growth,” and fail “employees, customers, and the communities in which they operate.”⁵⁴ Large repurchase programs further this trend, as firms suppress wages even for educated and experienced workers to shift capital to short-term shareholders.⁵⁵ Long-term shareholders, alternatively, may lose out as firms fail to make strategic long-term re-investments to improve their market position in the future.⁵⁶ Initiating a rulemaking to reform Rule 10b-18 would provide the SEC an opportunity to address these concerns with respect to repurchase programs.

III. Proposal to Repeal Rule 10b-18 and Develop a New Framework That Bans Manipulative Buybacks and Protects American Workers

Petitioners respectfully request that the Commission initiate a rule change to ban manipulative repurchases and protect American workers.

First, we ask the Commission to repeal Rule 10b-18 and reset the regulatory landscape to the pre-1982 regime. Prior to Rule 10b-18, repurchase programs were relatively uncommon because the potential for a market manipulation charge inhibited their abuse. Repealing the current safe harbor would re-set incentives by keeping firms subject to the deterrent effect of market manipulation charges for abusing repurchase programs, consistent with the anti-manipulation and anti-fraud provisions of the Securities and Exchange Act.⁵⁷

Second, we ask the Commission to undertake a rulemaking to develop a more comprehensive framework for regulating stock repurchase programs that would deter manipulation and protect American workers.

The Commission’s own history provides a potential starting point for such a regulatory regime. Proposals by the SEC between 1970 and 1980 set out to “prevent an issuer from

⁵³ Cf. Lynn Stouth, *The Shareholder Value Myth*, Cornell Law Faculty Publications (2013), <https://scholarship.law.cornell.edu/cgi/viewcontent.cgi?article=2311&context=facpub> .

⁵⁴ Larry Fink 2019 Letter to CEOs, BlackRock, <https://www.blackrock.com/corporate/investor-relations/larry-fink-ceo-letter>.

⁵⁵ William Lazonick, *The New Economy Business Model and the Crisis of U.S. Capitalism*, (“While high-tech companies spend money on buybacks to boost their stock prices, they boost their profits by terminating the employment of educated and experienced members of the US labor force in favor of employees in low-wage areas of the world – which in turn provides the “earnings” to sustain their buyback activity.”), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2209322&download=yes.

⁵⁶ Karen Brettell et al., *As stock buybacks reach historic levels, signs that corporate America is undermining itself*, Reuters (Nov. 16, 2015), <https://www.reuters.com/investigates/special-report/usa-buybacks-cannibalized/>; Jim Pavia, *Share buybacks: Boon or boondoggle for investors?*, CNBC (Jul. 14, 2015), <https://www.cnbc.com/2015/07/14/share-buybacks-boon-or-boondoggle-for-investors.html>.

⁵⁷ E.g., 15 U.S.C. § 78i(a)(2); 17 C.F.R. § 240.10b-5.

effecting repurchases which may have a manipulative or misleading impact on the trading market in the issuer's securities."⁵⁸ Recognizing the potential for manipulation through repurchase programs, particularly by incumbent management,⁵⁹ the proposals would have placed conditions "designed to ensure that an issuer neither leads nor dominates the trading market in its securities" on repurchase programs.⁶⁰ The proposals differed substantially from Rule 10b-18. In particular, the following were proposed:

- Limiting repurchases to 15 percent of the average daily trading volume for that security.⁶¹
- Creating a narrower safe harbor and allowing repurchases that fall outside this safe harbor to be reviewed and approved on an individualized, case-by-case basis.⁶²
- Providing that repurchases inconsistent with the safe harbor are expressly "unlawful as fraudulent, deceptive, or manipulative."⁶³
- Requiring various disclosures, including whether any officer or director is purchasing or disposing of the issuer's securities, the source of funds to be used to effect the repurchases, the impact of the repurchases on the value of the remaining outstanding securities,⁶⁴ and specific disclosures for large repurchases.⁶⁵

These proposals, none of which are reflected in Rule 10b-18, should now be considered anew by the Commission in light of the demonstrated impacts under the current version of the Rule, particularly given market behavior after the Tax Cuts and Jobs Act of 2017.

Further, the SEC should also draw from the experience of foreign countries. Among the ten countries with the largest capital markets, the U.S. is the only country without clear limitations on repurchase programs.⁶⁶ Other countries require immediate disclosure, have bright-line trading limits, require shareholder rather than board approval, and prohibit executive trading during repurchase program periods. For example, Japan and the United Kingdom require daily disclosure of repurchases. Though not a substitute for regulation, immediate disclosure provides the market and regulators an opportunity to supervise

⁵⁸ SEC, Repurchase of Securities and Prohibitions Against Certain Trading, 38 Fed. Reg. 34341 (Dec. 13, 1973); *see also* SEC, Notice of Proposed Rulemaking, 35 Fed. Reg. 11410 (July 16, 1970); SEC, Purchases of Certain Equity Securities by the Issuer and Others, 45 Fed. Reg. 70890 (Oct. 27, 1980).

⁵⁹ 45 Fed. Reg. 70891.

⁶⁰ 38 Fed. Reg. 34341; *see also* 45 Fed. Reg. 70891 ("The volume limitations are designed to prevent the issuer from dominating the market in its securities by purchasing large amounts of those securities relative to trading by independent parties.").

⁶¹ *Id.*; 38 Fed. Reg. 34341.

⁶² *Id.* 11412.

⁶³ 35 Fed. Reg. 11411; *see also* 38 Fed. Reg. 34343 ("It shall constitute a fraudulent, deceptive or manipulative act or practice for an issuer *** to bid for or purchase any of its equity securities in contravention of the terms and conditions specified herein").

⁶⁴ 38 Fed. Reg. 34342.

⁶⁵ 45 Fed. Reg. 70905.

⁶⁶ Lenore Palladino, *The \$1 Trillion Question: New Approaches to Regulating Stock Buybacks*, Yale J. Reg., <http://yalejreg.com/the-1-trillion-question-new-approaches-to-regulating-stock-buybacks/>.

repurchase activities. Several countries, including France, Germany, Italy, Switzerland, and the Netherlands, enforce a bright-line limit volume limit of 10 percent of outstanding shares within an eighteen-month period. These and other regimes are an instructive basis for future SEC rulemaking.

In conclusion, Petitioners respectfully request that the Commission promptly initiate a rulemaking to repeal and reform Rule 10b-18 to address manipulative repurchase programs that harm workers.

Respectfully Submitted,

ACRE (Action Center on Race and the Economy)

AFL-CIO

American Family Voices

Americans for Financial Reform Education Fund

Center for Popular Democracy

Color of Change

Committee for Better Banks

Communications Workers of America (CWA)

Consumer Action

CtW Investment Group

Demand Progress Education Fund

Institute for Policy Studies, Global Economy Project

Partnership for Working Families

Proxy Impact

Public Citizen

Strong Economy for All Coalition

Take on Wall Street

United for Respect
Woodstock Institute