PROPOSED ACTION MEMORANDUM

Limiting Stock Buybacks Among Recipients of Inflation Reduction Acts Funds

Multiple Agencies
December 2022

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I. Summary

Public companies have increasingly engaged in share repurchase programs, or "stock buybacks," as a method of distributing value to shareholders, due in large part to short-term executive compensation incentives. Companies use profits to make purchases of their own stock instead of investing in innovation or in their workers, which benefits executives and shareholders at the expense of the broader economy's health.

Recent landmark legislation, including the Inflation Reduction Act ("IRA"), holds incredible potential to accelerate decarbonization and offer the United States a competitive edge in 21st-century industries like semiconductor manufacturing. These policies mark a new moment in activist industrial policy making. In other words, the government is prioritizing certain industrial sectors and approaches to influence the production of goods and services.[1]

However, without clear "guardrails" for corporate behavior — rules that limit prioritizing shareholder wealth over investing in a company's future — companies will remain oriented towards shareholder primacy even while they receive public funding for investment and innovation.[2] The corporate orientation to maximize shareholder payments, including through stock buybacks, runs contrary to the goals of industrial policy.

To ensure that taxpayer dollars are used to combat climate change and create a green economy, rather than to pad the pockets of executives and shareholders, this memo proposes that agencies administering grant and loan programs under the IRA should prioritize applications from companies that commit to not engage in stock buybacks within a certain amount of time of their grant's issuance[3] or 12 months of their loan's full repayment or discharge.

II. Justification

A stock buyback is a corporate finance transaction in which a publicly-traded company buys shares of its own stock on the open market.[4] This reduces the supply of tradable stocks, increasing the share price and distributing value to sharesellers and (in some cases) to remaining shareholders. Executives' compensation is often based in part on share price and earnings-per-share metrics, so they are incentivized to engage in buybacks.[5]

As the economy recovered slowly and unevenly from the 2008 financial crisis, companies were roundly criticized for contributing to an unequal financial recovery by funneling increased profits to shareholders, rather than investing in equipment, workers, or innovation.[6] During the period from

[1] Lenore Palladino, *Why Biden's New Industrial Policy Won't Work Without Reforms*, (Sept. 22, 2022), https://www.bostonreview.net/articles/why-bidens-new-industrial-policy-wont-work/.
[2] Lenore Palladino and Isabel Estevez, *The Need for Corporate Guardrails in US Industrial Policy*, Roosevelt Institute, (Aug. 2022), https://rooseveltinstitute.org/wp-content/uploads/2022/08/RI_CorporateGuardrailsInUSIndustrialPolicy_IssueBrief_202208.pdf.
[3] Or, if relevant to the particular program, the length of the grant term. The precise amount of time that would be most effective is worthy of further research.
[4] Benjamin Curry, *What is a Stock Buyback?*, Forbes Advisor (Jun. 27, 2022), https://www.forbes.com/advisor/investing/stock-buyback/.
[5] Lenore Palladino, *Do Corporate Insiders Use Stock Buybacks for Personal Gain?*, Roosevelt Institute, (Jul. 2, 2019), https://rooseveltinstitute.org/publications/do-corporate-insiders-use-stock-buybacks-for-personal-gain/.
[6] *See, e.g.*, William Lazonick, *Profits Without Prosperity*, Harvard Business Review (Sept. 2014), https://hbr.org/2014/09/profits-without-prosperity.

2003 to 2012, S&P 500 firms used 54 percent of their profits to buy back their own stock and distributed 37 percent of profits to shareholders through dividends. This left only 9 percent of profits to fund increased productive capabilities or better wages and conditions for workers.[7]

The trend of directing corporate profits to buybacks grew during the decade running up to the Covid-19 pandemic, in which companies across sectors prioritized increasing shareholder payments and executive compensation. For example, President Trump expressed disappointment when companies used their increased profits from the 2017 Tax Cuts and Jobs Act to accelerate their buyback programs.[8] Prioritizing maximal shareholder value in some sectors even led to delays in the production of medical supplies that turned out to be necessary during the pandemic.[9] Furthermore, many of America's largest corporations fought employee demands for hazard pay and personal protection equipment during the pandemic, claiming these essential protections would be too costly, while ignoring the billions they had spent (and in some cases continued to spend) on buybacks in previous years.[10]

Entire industries that had, for years, been squandering profits on share repurchase programs came to the federal government hat-in-hand for relief.[11] Congress responded swiftly and funneled $1.7 trillion to the nation's businesses in the form of stimulative loans and grants.[12]

Congress enacted the IRA to, among other goals, make the largest investment in history to combat the climate crisis, increase American energy security, create good-paying jobs, and position the United States to be a world leader in clean energy.[13] Each of the law's grant and loan programs have specific purposes that contribute to these overarching aims. The climate investments that Congress established through statute are meant to increase the number of green technology projects over the number that would exist in a world where the IRA was not enacted. It would thwart Congress' goals if agencies that implement the programs don't deprioritize recipients that would use federal funds for stock buybacks or to free up corporate funds from pre-planned investments to engage in stock buybacks.

III. Current State

A. Buyback bans in CARES and CHIPS Acts

As it crafted the largest set of fiscal stimulus measures in United States history, Congress was concerned about companies' track record of stock buybacks, and sought to limit the extent to which federal money could be used toward such activities.

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7 *Id.*

8 Steve Holland, *Trump slams companies for using U.S. tax credit to buy back stocks*, Reuters, (Mar. 20, 2020), https://www.reuters.com/article/us-health-coronavirus-trump-buybacks-idUSKBN2173HY.

9 Lenore Palladino & William Lazonick, *Regulating Stock Buybacks: The $6.3 Trillion Question* 4, Roosevelt Institute, (May 10, 2021), https://rooseveltinstitute.org/publications/regulating-stock-buybacks-the-6-3-trillion-question/.

10 *Id.*

11 For example, the passenger air industry went on such a significant stock buyback spree in the decades since the 2008 financial crisis that Congress's rescue package specifically singled out the industry for a temporary stock buyback ban. Leslie Josephs, *Airline unions urge carriers not to resume buybacks when bailout ban ends this fall*, CNBC, (Aug 18, 2022), https://www.cnbc.com/2022/08/18/airline-unions-urge-carriers-not-to-resume-buybacks-when-bailout-ban-ends-this-fall.html.

12 Alicia Parlapiano, et. al., *Where $5 Trillion in Pandemic Stimulus Money Went*, New York Times, (Mar. 11, 2022), https://www.nytimes.com/interactive/2022/03/11/us/how-covid-stimulus-money-was-spent.html.

13 House Committee on the Budget, The Inflation Reduction Act, (Accessed: Nov. 18, 2022), https://budget.house.gov/legislation/InflationReductionAct.

The March 2020 Coronavirus Aid, Relief, and Economic Security ("CARES") Act was a $2.2 trillion stimulus package designed to limit the economic impact of the pandemic.[14] It included direct payments to individuals and households, tax rebates, a moratorium on evictions and foreclosures, extensions of unemployment programs, and a paycheck protection program.[15] It also included billions of dollars in direct, low-interest loans to specific industries, including passenger and cargo airlines and national defense-related businesses,[16] as well as to support other mid-sized businesses and nonprofits.[17] In an effort to protect taxpayers from subsidizing returns for shareholders and to "put workers first,"[18] the statute banned companies that received these loans from engaging in share repurchases within 12 months of the date that their loan was no longer outstanding.[19]

The 2022 Creating Helpful Incentives to Produce Semiconductors ("CHIPS") Act included an explicit prohibition on engaging in stock buybacks with public funds reaped from grants and loans authorized by the statute.[20] However, the legislation did not explicitly prohibit companies that receive CHIPS funds from engaging in stock buybacks using other funds — including funds freed up by their receipt of CHIPS funds.[21] To discourage recipients from using CHIPS funds to enable stock buybacks, the Department of Commerce ("DOC") announced in an August 2022 statement that it would "give preference to companies that commit not to engage in stock buybacks."[22] In a letter written by Senator Elizabeth Warren, several members of Congress "applaud[ed] the [DOC's] commitment to ensuring that not only are CHIPS funds not used to directly fund stock buybacks, but that they also do not indirectly enable buybacks."[23]

B. The Inflation Reduction Act

The IRA is a large spending bill that includes direct loans and grants to industry to, among other activities, develop green technologies and modernize the electrical grid. However, the statute does not contain an explicit statutory prohibition on stock buybacks. Without proper guardrails on federal funds flowing to industry, the IRA's potential to accelerate the development of a green economy could be diminished by companies' decisions to use the funds to deliver benefits to shareholders and executives instead.[24] Fortunately, in most cases, the federal agencies that will administer IRA-funded grant and loan programs possess the legal authority to establish such guardrails.

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[14] 15 U.S.C. § 9001 *et seq.*
[15] Sharon Parrott, *CARES Act Includes Essential Measures to Respond to Public Health, Economic Crises, But More Will Be Needed*, CBPP, (Mar. 27, 2020), https://www.cbpp.org/research/economy/cares-act-includes-essential-measures-to-respond-to-public-health-economic-crises.
[16] 15 U.S.C. § 9042(b).
[17] 15 U.S.C. § 9042(c)(3)(D).
[18] Press Release, Rep. Carolyn B. Maloney: Maloney Statement for the Congressional Record on H.R. 748, the CARES Act, (Mar. 27, 2020), https://maloney.house.gov/media-center/press-releases/maloney-statement-for-the-congressional-record-on-hr-748-the-cares-act.
[19] 15 U.S.C. §§ 9042(c)(2)(E), 9042(c)(3)(A)(ii)(I).
[20] CHIPS Act, Section 102(g) https://www.congress.gov/bill/117th-congress/house-bill/4346/text?q=%7B%22search%22%3A%5B%22hr4346%22%2C%22hr4346%22%5D%7D&r=1&s=9
[21] Lenore Palladino and Isabel Estevez, *The Need for Corporate Guardrails in US Industrial Policy* 19, Roosevelt Institute, (Aug. 2022), https://rooseveltinstitute.org/wp-content/uploads/2022/08/RI_CorporateGuardrailsInUSIndustrialPolicy_IssueBrief_202208.pdf.
[22] Letter to Secretary Raimondo from Senator Elizabeth Warren, et. al. (Oct. 4, 2022), https://www.warren.senate.gov/imo/media/doc/2022.10.04%20Letter%20to%20Commerce%20re%20CHIPS%20Stock%20Buybacks.pdf citing National Institute of Standards and Technology, *Taxpayer Protections*, (Aug 25, 2022), https://www.nist.gov/semiconductors/taxpayer-protections. (internal quotations omitted).
[23] *Id.*
[24] *See generally*, Lenore Palladino and Isabel Estevez, *The Need for Corporate Guardrails in US Industrial Policy*, Roosevelt Institute, (Aug. 2022), https://rooseveltinstitute.org/wp-content/uploads/2022/08/RI_CorporateGuardrailsInUSIndustrialPolicy_IssueBrief_202208.pdf.

IV. Proposed Action

A. Prioritize IRA grant and loan applicants that will not engage in stock buybacks

Agencies administering IRA loan and grant programs should, wherever possible, include statements in their funding opportunity announcements ("FOAs") indicating that they will prioritize applications from companies that commit to not conducting share repurchase programs within 12 months of their loan being outstanding (which is the time frame established under the CARES Act[25]) or for a period of time after their grant is issued.[26] The agencies can base this decision on the flexibility generally afforded to funding agencies in administering grant programs and the fact disincentivizing stock buybacks advances the statutory purpose of specific grant and loan programs.

B. Legal authority

Funding agencies have the authority to interpret certain IRA provisions to allow the agency to prioritize recipients that commit to not engaging in stock buybacks. Agencies have discretion in distributing federal grants that are — like the IRA programs — competitive and not based on a statutory formula.[27] Agencies' discretion exists as long as the prioritization and conditions they set are in line with the purposes of the statute that authorizes the programs.[28]

As described by Senator Joe Manchin of West Virginia, the legislation's principal author, the climate-related purpose of the IRA is to address the United States' "energy and climate crisis by adopting common sense solutions through strategic and historic investments that allow us to decarbonize while ensuring American energy is affordable, reliable, clean and secure."[29] The House Budget Committee explained in a contemporaneous report that the legislation aims to "accelerate[] the clean energy transition by funding grants, rebates, and loans to commercialize emerging clean energy technologies," and "onshore clean energy manufacturing in the United States so we can lead the globe in clean energy."[30] Senator Ron Wyden, Chair of Senate Finance Committee and one of the bill's lead authors, described in a floor speech that the climate section's purpose is to "turbocharge investment in clean electricity, clean transportation, and energy conservation."[31] In a statement applauding the law's

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[25] 15 U.S.C. §§ 9042(c)(2)(E), 9042(c)(3)(A)(ii)(I).

[26] Or, if relevant to the particular program, the length of the grant term. The difference in time frames between grants and loans is due to the difference in time during which the entity has possession of federal money. In the loan context, once the loan is no longer outstanding, the entity does not have possession of federal money. In the grant context, however, the company may use the money over a period of years in a series of investments.

[27] *See* Brian T. Yeh, *The Federal Government's Authority to Impose Conditions on Grant Funds* 5-6, Congressional Research Service (Mar. 23, 2017), https://sgp.fas.org/crs/misc/R44797.pdf (hereinafter "CRS Report"); *see also City of Chicago v. Sessions, 888 F.3d 272, 286 (7th Cir. 2018), reh'g en banc granted in part, opinion vacated in part,* No. 17-2991, 2018 WL 4268817 (7th Cir. June 4, 2018), *vacated*, No. 17-2991, 2018 WL 4268814 (7th Cir. Aug. 10, 2018) (explaining that Congress's choice to employ a discretionary grant program rather than a formula grant program "provide[s] an agency the ability to exercise its judgment in the selection of the grantees").

[28] *Id.*; *see also* Government Accountability Office, Principles of Federal Appropriations Law Chapter 2 GAO-16-464SP 2-32 (Nov. 2019), https://www.gao.gov/assets/2019-11/675709.pdf (hereinafter "GAO Report").

[29] Senator Joe Manchin, *Manchin Supports Inflation Reduction Act of 2022*, (Jul. 27, 2022), https://www.manchin.senate.gov/newsroom/press-releases/manchin-supports-inflation-reduction-act-of-2022.

[30] "A WIN FOR THE PEOPLE AND OUR PLANET: HOW THE INFLATION REDUCTION ACT LOWERS COSTS AND ACTS ON CLIMATE," House Budget Committee 4 (Aug. 11, 2022), https://budget.house.gov/sites/democrats.budget.house.gov/files/HBC%20REPORT_A%20Win%20for%20the%20People%20and%20our%20Planet%20How%20the%20Inflation%20Reduction%20Act%20Lowers%20Costs%20and%20Acts%20on%20Climate.pdf.

[31] "Wyden Delivers Floor Speech in Support of the Inflation Reduction Act," Senate Finance Committee, https://www.finance.senate.gov/chairmans-news/wyden-delivers-floor-speech-in-support-of-the-inflation-reduction-act (Aug. 6, 2022).

passage, Sen. Tom Carper, Chair of the Senate Environment and Public Works Committee and another key author of the IRA's climate package, described the bill as "the most significant climate legislation in history," and explained its intent was to "unleash the potential of the American clean energy industry."[32] The White House, and even energy industry groups, made similar statements concerning the law's passage.[33] In sum, everyone involved in adopting the legislation agreed: the IRA's climate provisions aim to encourage innovation and significant advances in green technology.

Stock buybacks, however, could thwart these overall goals. Without sufficient guardrails, a firm could use federal assistance to finance projects it had already planned to complete using private capital; those now-unallocated private funds could subsequently be directed toward share repurchase programs—effectively enriching shareholders at taxpayers' expense and undermining the IRA's objective of increasing investments in green technologies beyond the status quo baseline. The only way to ensure this two-step substitution does not occur is if firms refrain entirely from engaging in stock buybacks over the period in time in which they are benefitting from public subsidies. Moreover, research demonstrates that stock buybacks often come at the expense of innovation in the economy,[34] which, again, is the law's overarching objective. Prioritizing applicants that commit to eschewing stock buybacks, then, offers a way for agencies to ensure that the IRA's statutory goals are fulfilled.

When read in light of the statute's clean industrial goals, it is clear that agencies retain the authority to deprioritize firms that engage in stock buybacks within specific IRA grant and loan programs. (In fact, doing so is arguably the *best* interpretation of the various grant and loan provisions we examined, which we catalog in the Appendix.) To give one example of a program that would allow a stock buyback prioritization scheme,[35] section 50142 of the IRA appropriates $3 billion to the Department of Energy to issue direct loans under §136(d) of the Energy Independence and Security Act of 2007.[36] Per the IRA, loans are intended for "reequipping, expanding, or establishing a manufacturing facility in the United States to produce, or for engineering integration performed in the United States of, advanced technology vehicles … [as defined in 42 U.S.C. § 17013(a)(1)] … only if such advanced technology vehicles emit, under any possible operational mode or condition, low or zero exhaust emissions of greenhouse gases."[37] Eligible recipients include "automobile manufacturers, ultra efficient vehicle manufacturers, advanced technology vehicle manufacturers, and component suppliers."[38]

The Department can imply the authority to prioritize recipients that commit to eschewing stock buybacks from the provision's purposive language: i.e., that loans are intended for "reequipping, expanding or establishing a manufacturing facility" or "for engineering integration."[39] Allowing recipient-firms to issue stock buybacks risks the prospect that federal funds will simply displace pre-

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[32] "Carper Statement on Senate Passage of Inflation Reduction Act," Senate Committee on Environment and Public Works, https://www.epw.senate.gov/public/index.cfm/press-releases-democratic?ID=B946717A-2A85-458B-9521-45D3EE2D0642 (Aug. 7, 2022).

[33] "FACT SHEET: The Inflation Reduction Act Supports Workers and Families," The White House, https://www.whitehouse.gov/briefing-room/statements-releases/2022/08/19/fact-sheet-the-inflation-reduction-act-supports-workers-and-families/ (Aug. 19, 2022) ("The Inflation Reduction Act will incentiviz[e] domestic production in clean energy technologies like solar, wind, carbon capture, and clean hydrogen."); *see, e.g.,* Abigail Ross Hopper, "Senate Ushers in New Era of American Energy Leadership with Inflation Reduction Act," Solar Energies Industry Association, https://www.seia.org/news/senate-ushers-new-era-american-energy-leadership-inflation-reduction-act (Aug. 7, 2022) ("With the passage of the Inflation Reduction Act in the Senate, solar and storage companies are one step closer to having the business certainty they need to make the long-term investments that decarbonize the electric grid and create millions of new career opportunities in cities and towns across the country.").

[34] *See generally* William Lazonick, *Profits Without Prosperity*, Harvard Business Review (Sept. 2014), https://hbr.org/2014/09/profits-without-prosperity.

[35] More examples of IRA grant and loan programs for which public companies are eligible to apply are appended to this document.

[36] 42 U.S.C. § 17013(d).

[37] IRA § 50142(a).

[38] 42 U.S.C. § 17013(b).

[39] IRA § 50142(a).

planned private financing for such projects, rather than generate new investments. And this would undermine the statute's purpose: accelerating the decarbonization shift above the pre-IRA baseline.

The §136(d) loan program's original statutory language provides additional support for disincentivizing stock buybacks. While §136(b) outlines the *types* of eligible entities,[40] §136(d) explicitly empowers the Secretary to determine eligibility within those categories, or, to use this memo's terminology, to prioritize certain applicants: "the Secretary shall carry out a program to provide loans to eligible individuals and entities (*as determined by the Secretary*) …"[41]

This memo covers other programs that could benefit from stock buyback guardrails in the appendix.[42]

V. Additional Considerations

A. Threshold questions

i. Standing

Due to limitations on standing, it may be difficult for an entity to challenge a grant decision in the first place. Establishing standing to challenge an agency's grant decision is notoriously difficult.[43] Essentially, the question of standing refers to whether a litigant is entitled to have a court decide the merits of the dispute at issue.[44] While standing doctrine includes non-constitutional considerations as well, the most basic constitutional test requires plaintiffs to show that they (1) have suffered an injury in fact that is "concrete and particularized" and "actual or imminent," as opposed to "conjectural or hypothetical"; (2) that the injury is "fairly traceable" to the defendant's challenged action; and (3) that the injury is likely to be redressed if the court were to rule in the plaintiff's favor.[45]

Given the restrictions on standing outlined here, it is difficult to imagine many plaintiffs having standing to sue a funding agency over its decision to prioritize grant applications from entities that commit to not engaging in stock buybacks. Thus, potential standing might only exist for a small set of companies that apply for grants or loans, and are denied. However, FOAs typically contain a long list of conditions, and litigants would likely struggle to prove that any single condition — especially a prioritization decision — was the single, but-for cause of their denial.

Further, even if a company whose grant application was denied *could* establish standing, that does not necessarily mean that the company *would* sue. The reputational risk presented by filing a lawsuit to assert a company's right to spend taxpayer money on stock buybacks may be (or at least should be) prohibitive.

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[40] 41 U.S.C. § 17013(b) ("The Secretary shall provide facility funding awards under this section to automobile manufacturers, ultra efficient vehicle manufacturers, advanced technology vehicle manufacturers, and component suppliers…").
[41] 41 U.S.C. § 17013(d) (emphasis added).
[42] *See infra* at 12.
[43] *See, e.g.,* Robert S. Catz, Standing to Challenge Federal Grant Termination, 19 Urb. L. Ann. 87 (1980), https://openscholarship.wustl.edu/law_urbanlaw/vol19/iss1/5.
[44] Will Dobbs-Allsop & Rachael Klarman, Solving Standing's Corporate Bias: How Agencies Can Empower Advocates to Challenge Deregulation 7, Roosevelt Institute Issue Brief, (Jul. 2021), https://govforimpact.wpengine.com/wp-content/uploads/2021/07/Solving-Standings-Corporate-Bias.pdf citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975).
[45] *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560-61 (1992).

Another set of potential plaintiffs are shareholders, including institutional investors like mutual funds and pensions. Such shareholders might argue that they suffer an economic injury if the companies in which they hold stock are not able to engage in buybacks that would increase their share price. However, as described above, constitutional standing requires that the plaintiff's injury be caused by ("fairly traceable" to) the defendant's action.[46] "Although standing is not precluded in a case that turns on third-party conduct, it is ordinarily substantially more difficult to establish."[47] In a shareholder case against the funding agency, it is not the funding agency's grant or loan selection criteria that would cause the shareholders' economic injury, but rather the company's decision to apply for a grant or loan program that has such criteria.

ii. Reviewability

The APA excludes from judicial review agency actions that are "committed to agency discretion by law."[48] Although there is ample disagreement among courts and academics about the scope of this exclusion, it is generally considered to be important when statutory language is so vague that a court has essentially "no law to apply" to decide whether the agency acted within its bounds.[49] A recent district court case helped explain its scope in the agency grant-making context.[50] The court in that case concluded that the statutory "purpose" attached to the grant funding was not vague enough to sustain the agency's claim of non-reviewability.[51] However, in doing so, it highlighted that some statutory language authorizing grant programs *can* lend itself to agency actions being non-reviewable. The court collected a series of cases where this was true:

> *Lincoln*, 508 U.S. at 185, 113 S.Ct. 2024 (holding appropriations statute requiring agency to "expend such moneys as Congress may from time to time appropriate, for the benefit, care, and assistance of the Indians for the relief of distress and conservation of health" committed expenditure to agency discretion); *Los Coyotes*, 729 F.3d at 1038 ("The Tribe does not identify any specific appropriation it believes should have been allocated for law enforcement on the reservation, let alone specific language in an appropriation that deprives the Secretary the discretion to allocate the funds."); *Serrato*, 486 F.3d at 569 (holding Congress's use "of the word 'may,' did not mandate that the program operate continuously" and therefore the decision to terminate the program was not susceptible to judicial review); *Milk Train*, 310 F.3d at 751 (holding appropriations statute with language "in a manner determined appropriate by the Secretary[,]" was committed to agency discretion and "left to the Secretary's sole judgment").[52]

The IRA includes a myriad of grant programs, many of which have their own statutory "purpose" language. Identifying each and determining whether such language is vague enough to commit grant decisions to the agency's discretion under the APA is beyond the scope of this document. However,

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[46] *Id.*

[47] *Arpaio v. Obama*, 797 F.3d 11, (D.C. Cir. 2015); *see also Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 941 (D.C. Cir. 2004) (explaining that, in order to demonstrate injury based on third-party conduct, plaintiffs must provide "substantial evidence of a causal relationship between the government policy and the third-party conduct, leaving little doubt as to causation and the likelihood of redress"); *see also Simon v. E. Kentucky Welfare Rts. Org.*, 426 U.S. 26, 41 (1976) (explaining that the "fairly traceable" requirement generally restrains courts from redressing "injury that results from the independent action of some third party not before the court").

[48] 5 U.S.C § 701(a)(2); *see also* GAO Report at 31-35.

[49] *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 410 (1971).

[50] *Multnomah Cnty. v. Azar*, 340 F. Supp. 3d 1046, 1062 (D. Or. 2018).

[51] *Id.*

[52] *Id.*

it is possible that some of these grant programs are authorized by language that is vague enough to preclude judicial review.

B. Merits

Even if the statutory appropriation is not vague enough to commit grant decisions to agency discretion by law, a court should find that a prioritization scheme meant to prevent federal funds passing through public companies to their shareholders and executives in the form of stock buybacks is in line with Congressional intent for the grant programs.

A court might make this determination through application of the *ultra vires* doctrine, which protects separation of powers principles by mandating that an agency "has no power to act … unless and until Congress confers power upon it."[53] In the grant making context, this means that an agency cannot change grant conditions dictated by Congress.[54] Thus, the agency would need to issue these conditions for receiving funds in a manner that is grounded in the statutory purpose for the grant or loan programs.

The primary argument that plaintiffs challenging this action would likely make is that prioritizing applicants that commit to not engage in stock buybacks exceeds the scope of statutory authority. Unless the statute is unambiguous or an exception to *Chevron* applies, however, an agency's reasonable interpretation of a statute is entitled to deference.[55] Because the IRA's text does not include mention of stock buybacks in the context of its grant or loan programs, it is not likely to be unambiguous on the subject. The funding agency would have a compelling argument that its use of a stock buyback consideration in these grant and loan programs is a reasonable interpretation of the statutory language. These arguments would be based on the idea that, in the grant context, the statute's stated purposes for the program are exhaustive and using funds for stock buybacks would run counter to those purposes.

A plaintiff might also argue that the fact that Congress included a stock buyback ban in the CARES Act and an excise tax on stock buybacks elsewhere in the IRA itself suggests that Congress considered and decided not to place conditions on grant and loan recipients' ability to engage in repurchases. A response to this argument could be: IRA was a piece of omnibus legislation, the provisions and sections of which were not all necessarily related; the fact that Congress enacted a stock buyback excise tax in one section or another statute should not imply that Congress meant to allow stock buybacks through its grant programs in another.[56] Indeed, courts have discounted the usefulness of the *expressio unius* canon – the inference that inclusion of language in one section of a statute implies its exclusion in another where it does not appear – in the administrative realm where "Congress is presumed to have left to reasonable agency discretion questions that it has not directly resolved."[57] Additionally, and perhaps most importantly, the IRA's primary statutory purpose was to incentivize industry to develop and deploy new technologies at a massive scale. As discussed above, stock buybacks have the

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53 *Id.* quoting *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).
54 *Id.* citing *City of Los Angeles v. Sessions*, 293 F.Supp.3d 1087, 1095 (C.D. Cal. 2018).
55 *See generally Chevron v. NRDC*, 467 U.S. 837 (1984). Alternatively, a court may afford the agency's interpretation a less deferential "power of persuasion" under *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944), which applies to agency interpretations "contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law." *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000).
56 Because of the Senate filibuster, too, the IRA was an all-hands-on-deck amalgamation of President Biden's entire domestic policy agenda.
57 *Nasdaq Stock Mkt. LLC v. Sec. & Exch. Comm'n*, 38 F.4th 1126, 1137 (D.C. Cir. 2022) (internal quotations omitted).

effect of decreasing innovation and investment in new technologies, so prioritizing recipients that commit to eschewing them is precisely in line with the statutory mandate.

Finally, as in virtually all challenges to agency action in the current legal environment, plaintiffs might invoke the Supreme Court's new major questions doctrine ("MQD"). A string of Supreme Court decisions that culminated in June 2022's *West Virginia v. EPA* has profound implications for the legal environment confronting agency regulators.[58] In a change from the typical deference afforded to federal agencies, the *West Virginia* Court deployed the MQD to invalidate the EPA's Clean Power Plan, which was an Obama-era greenhouse gas regulation that relied on a rarely-used section of the Clean Air Act. The first part of a two-step MQD test that the Court established was to consider whether the "'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion" were such that the regulation posed a "major question." The general inquiry underlying this prong is whether there is "reason to hesitate before concluding that Congress meant to confer such authority."[59] If the regulation does pose a "major question," then the Court must examine the authorizing statute for a "clear congressional authorization."[60] If the Court is unable (or unwilling) to find one, the regulation is invalid.

An agency's decision to include a particular prioritization scheme in an FOA for a grant or loan program should not trigger MQD because federal agencies setting conditions for the receipt of federal funds is a fairly common exercise of federal agency authority.[61] There also has not yet been an MQD case about competitive grant programs. Nor is such a prioritization decision economically or politically significant, as the amount of money affected is miniscule relative to the federal budget or to the national economy.[62]

C. Enforcement

Admittedly, holding companies to their promises not to engage in stock buybacks could pose a challenge in some circumstances. Unlike other big spending bills, the IRA does not include a robust clawback mechanism for the government to pursue misspent funds.

However, two enforcement mechanisms could prevent companies from reneging on a commitment to not issue buybacks. One, the funding agencies could announce they will consider a firm's history of abiding by federal commitments in future funding opportunities.[63]

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[58] 142 S. Ct. 2587 (2022).

[59] *W. Virginia*, 142 S. Ct. at 2595 (2022) quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159–160 (2000) (internal quotations omitted).

[60] "Something more than a merely plausible textual basis for the agency action is necessary." *Id.* at 2606 quoting *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014).

[61] Indeed, funding agencies already do this kind of conditioning and prioritization based on other policy goals, like ensuring that federal benefits flow to historically disadvantaged communities. For example, in a Department of Energy ("DOE") funding announcement for a photovoltaic research and development grant under the bipartisan infrastructure deal, DOE includes in its selection criteria: "[t]he degree to which the proposed project maximizes benefits to" disadvantaged communities. Also, in the draft FOA for this program, the DOE required applicants to submit a Community Benefits Plan as part of "criterion 4" for grant application evaluation. A Community Benefits Plan must take into account: 1) meaningful community and labor engagement, 2) investment in America's workforce, 3) advance diversity, equity, inclusion, and accessibility, and 4) contribute to the President's goal that 40% of the overall project benefits flow to DACs. *See* Department of Energy DE-FOA-0002582, Bipartisan Infrastructure Law: Photovoltaics Research and Development (PVRD) at 71, 83, (Jul. 25, 2022), https://eere-exchange.energy.gov/Default.aspx#FoaId30e71a30-693a-4bbd-aecc-64988444aede.

[62] For example, the grant program referenced in a previous section is only $3 billion. Even if a court's determination of significance was based on the overall size of the IRA, the numbers of actually eligible public companies and the amount of money flowing to them would still pale in comparison to the effects of administrative actions that courts have found to be "major" in the past.

[63] Consequences could include administrative actions to terminate and recover funds. *See* CRS Report at 6-7 citing OMB Guidelines to Agencies on Governmentwide Debarment and Suspension (Nonprocurement Programs and Activities), 2 C.F.R. Part 180.

Two, the Justice Department or private plaintiffs could bring enforcement cases under the False Claims Act ("FCA").[64] The FCA allows either the Justice Department or private parties to sue or prosecute entities that make false claims to the government that result in the government issuing payment. To establish the most common type of FCA claim, a party must prove: a false claim; that was made with knowledge of its falsity; that was material to the government's payment; and that caused the government to pay money.[65] FCA penalties include fines, treble damages, and litigation costs.[66] The Justice Department and private plaintiffs have previously brought FCA claims that have resulted in penalties and settlements involving entities that make material misstatements of facts in federal grant applications.[67] FCA claims are most common in the Medicaid and Medicare fraud context, and have also been used against people who defrauded the CARES Act's paycheck protection program.[68] The Justice Department and private plaintiffs could use similar claims against companies that obtain federal grant money through misrepresenting their intentions with respect to stock buybacks.[69]

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[64] 31 U.S.C. § 3729.

[65] Seyfarth, *Money for Nothing—Except Potential False Claims Act Liability*, (Aug. 4, 2020), https://www.seyfarth.com/news-insights/money-for-nothingexcept-potential-false-claims-act-liability.html.

[66] *Id.*

[67] *See, e.g.*, *U.S. ex rel. Feldman v. van Gorp*, 697 F.3d 78, 97 (2d Cir. 2012) (upholding a district court FCA decision that found a research institution misrepresented its fellowship program when applying for federal research grant funding).

[68] *See, e.g.,* Department of Justice, *EEG Testing and Private Investment Companies Pay $15.3 Million to Resolve Kickback and False Billing Allegations*, (Jul. 21, 2021), https://www.justice.gov/opa/pr/eeg-testing-and-private-investment-companies-pay-153-million-resolve-kickback-and-false (Medicaid and Medicare); Department of Justice, First-Ever Paycheck Protection Program False Claims Act Whistleblower Case in Which the United States Intervened Against the Borrower Settles (Sept. 22, 2022) https://www.justice.gov/usao-sdfl/pr/first-ever-paycheck-protection-program-false-claims-act-whistleblower-case-which-united (Paycheck Protection Program).

[69] A federal grant is a "legal instrument reflecting a relationship between the United States Government and a State, a local government, or other recipient." 31 U.S.C. § 6304.

Appendix: Grant and Loan Program Examples

This appendix identifies some IRA grant and loan programs for which publicly-traded companies may be eligible. It briefly explains the legal argument that funding agencies could use to justify their decision to prioritize companies that commit to not engaging in stock buybacks.

1. *Alternative Fuel and Low-Emission Aviation Technology Program*

IRA Section 40007, Funding agency: Department of Transportation

This is a roughly $300 million grant program administered by the Department of Transportation, with the stated purpose of "establishing a competitive grant program for eligible entities to carry out projects located in the United States that produce, transport, blend, or store sustainable aviation fuel, or develop, demonstrate, or apply low-emission aviation technologies."[70] The IRA sets out several considerations that the Secretary of Transportation should make when distributing funds, including:

> (1) **the capacity for the eligible entity to increase the domestic production and deployment of sustainable aviation fuel or the use of low-emission aviation technologies among the United States commercial aviation and aerospace industry**; (2) the projected greenhouse gas emissions from such project, including emissions resulting from the development of the project, and the potential the project has to reduce H. R. 5376—214 or displace, on a lifecycle basis, United States greenhouse gas emissions associated with air travel; (3) **the capacity to create new jobs and develop supply chain partnerships in the United States**; (4) for projects related to the production of sustainable aviation fuel, the projected lifecycle greenhouse gas emissions benefits from the proposed project, which shall include feedstock and fuel production and potential direct and indirect greenhouse gas emissions (including resulting from changes in land use); and (5) the benefits of ensuring a diversity of feedstocks for sustainable aviation fuel, including the use of waste carbon oxides and direct air capture.[71]

The Department of Transportation could justify a stock buyback condition on the grounds that it is both complementary to the statutory purpose of the grant program and in line with the bolded considerations above. A company's decision to conduct share repurchases with these funds or with funds freed up by their receipt of these funds would be contrary to the grant program's goals of increasing the amount of net-new investment in enhancing domestic production capacity of sustainable fuel and creating jobs. As this memo discusses at length, the economic impact of stock buybacks are, indeed, the opposite: companies conduct them at the expense of expanding productive capacity, hiring more workers, or investing in innovation.

2. *Advanced Technology Vehicle Manufacturing*

IRA Section 50142, Funding agency: Department of Energy

See discussion in the body of the memo.[72]

[70] IRA § 40007(a).
[71] IRA § 40007(b).
[72] *See* Section IV.

3. *Domestic Manufacturing Conversion Grants*

IRA Section 50143, Funding agency: Department of Energy

Section 50143 of the Inflation Reduction Act appropriates $2 billion to the Department of Energy to provide grants "for domestic production of efficient hybrid, plugin electric hybrid, plug-in electric drive, and hydrogen fuel cell electric vehicles."[73] These grants are to be issued "in accordance with section 712 of the Energy Policy Act of 2005,"[74] which describes eligible entities as "automobile manufacturers and suppliers and hybrid component manufacturers."[75]

The Department can reasonably conclude that deprioritizing firms that preserve the right to engage in stock buybacks furthers the IRA's objectives. The apparent purpose of the provision is to boost the domestic production of these 21st century vehicles. Indeed, this objective is a persistent theme throughout the IRA; other of the Act's provisions provide tax incentives to onshore the supply chain for these vehicles.[76] For the reasons explained elsewhere in this memo,[77] a firm that receives grant funding under this provision and subsequently issues a stock buyback to enrich its shareholders would thwart that purpose.

Furthermore, by instructing the Department to act "in accordance" with §712 of the Energy Policy Act of 2005, Congress applied that section's criteria to these IRA funds. Section 712 explicitly states its purpose: "to encourage domestic production and sales of efficient hybrid and advanced diesel vehicles and components of those vehicles."[78] Absent adequate stock buyback guardrails, the grant program risks failing to meet that objective; grants might encourage shareholder enrichment, rather than increased production.

4. *Energy Infrastructure Reinvestment Financing*

IRA Section 50144, Funding agency: Department of Energy

Section 50144 of the Inflation Reduction Act appropriates $5 billion to, and authorizes $250 billion in loan guarantee authority for, the Department of Energy to implement a new reinvestment financing program, to be created at Section 1706 of the Energy Policy Act of 2005 (42 U.S.C. § 16517).[79] The provision instructs that guarantees can only be directed to projects that either (1) "retool, repower, repurpose, or replace energy infrastructure that has ceased operations," or (2) "enable operating energy infrastructure to avoid, reduce, utilize, or sequester air pollutants or anthropogenic emissions of greenhouse gases."[80]

In selecting among eligible loan guarantee recipients, the Department can prioritize applicants that commit to not engaging in stock buybacks. As evidenced by the above language, the intended purpose of the IRA's amendment to the Energy Policy Act of 2005 is to retrofit existing energy infrastructure to meet the demands of a decarbonizing economy, not to enrich shareholders by substituting taxpayer-backed capital for pre-planned private investment.

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[73] IRA § 50143(a).
[74] *Ibid.*
[75] 42 U.S.C. § 16062(a)(2).
[76] *See* IRA § 13041.
[77] *See* Section II.
[78] 42 U.S.C. § 16062(a)(1).
[79] IRA § 50144(a–b).
[80] 42 U.S.C. § 16517(a).

The Department's existing loan guarantee regulations at 10 C.F.R. § 609 affirm the ability to impose prioritization criteria, within statutory constraints, so long as those factors are outlined in funding solicitations.[81] Those regulations outline a list of materials that an applicant must submit in order to be eligible for financing, but describe those prerequisites as "a minimum."[82] The regulations continue that "in reviewing completed Applications, and in prioritizing and selecting those as to which a Term Sheet should be offered, DOE will apply the criteria set forth in the Act, any applicable Solicitation, and this part," including "such other criteria that DOE deems relevant in evaluating the merits of an Application."[83]

5. *Funding for Department of Energy Loan Programs Office*

IRA Section 50141, Funding agency: Department of Energy

Section 50141 of the Inflation Reduction Act empowers the Secretary of Energy to make new loan guarantee commitments up to a total principal amount of $40 billion for clean energy projects under the loan guarantee authority established by Section 1703 of the Energy Policy Act of 2005.[84] The list of eligible projects under the Energy Policy Act is long, and includes "[r]enewable energy systems," "[h]ydrogen fuel cell technology for residential, industrial, or transportation applications," "[c]arbon capture," "[p]ollution control equipment," "gasification projects," among others.[85]

In its loan guarantee decisions, the Department of Energy has discretion to prioritize applications from entities that commit to not engaging in stock buybacks. The Energy Policy Act's purpose was to "ensure jobs for our future with secure, affordable, and reliable energy," and allowing the companies to enrich shareholders by substituting taxpayer-backed capital for pre-planned private investment would run afoul of that mandate.[86]

Further, the IRA explicitly directs the loan authority to be used for a defined list of eligible projects delimited in the Energy Policy Act, all of which must "(1) avoid, reduce, utilize, or sequester air pollutants or anthropogenic emissions of greenhouse gases" and "(2) employ new or significantly improved technologies as compared to commercial technologies in service in the United States at the time the guarantee is issued, including projects that employ elements of commercial technologies in combination with new or significantly improved technologies."[87]

Finally, the Secretary's discretion in prioritizing applications is underscored by the IRA's wording: "the Secretary *may* make commitments to guarantee loans for eligible projects" (emphasis added).[88]

6. *Grants to Reduce Air Pollution at Ports*

IRA Section 60102, Funding agency: Environmental Protection Agency

Section 60102 of the IRA creates a $3 billion grant program at the Environmental Protection Agency ("EPA"):

> to award rebates and grants to eligible recipients on a competitive basis–

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[81] 10 C.F.R. § 609.3(a)(6).
[82] 10 C.F.R. § 609.4(d).
[83] 10 C.F.R. § 609.5(a),(b)(14).
[84] *See* IRA § 50141.
[85] 42 U.S.C. § 16513.
[86] Public Law 109-58, https://www.govinfo.gov/content/pkg/PLAW-109publ58/pdf/PLAW-109publ58.pdf.
[87] 42 U.S.C. § 16513(a).
[88] IRA § 50141(a).

(A) to purchase or install zero-emission port equipment or technology for use at, or to directly serve, one or more ports;
(B) to conduct any relevant planning or permitting in connection with the purchase or installation of such zero-emission port equipment or technology; and
(C) to develop qualified climate action plans.[89]

In addition to governmental bodies, the term "eligible recipients" includes "private entities that … own, operate or use [port] facilities, cargo-handling equipment, transportation equipment or related technology."[90]

The EPA could justify a FOA buyback condition on the basis that allowing recipients to use the grant money (or money freed up by the grant money) to buy back stock would frustrate the purpose of the grant program. In other words, the statutory purpose of the program is to increase investments in green technology at ports relative to what it would be without the IRA. Unless the EPA prohibits it, a recipient could receive a grant to make investments that they were planning on making anyway. It could then use the resulting savings from investment to engage in stock buybacks because money is fungible.[91]

Further, the requirement that the grants be distributed on a "competitive basis" does not restrict the EPA's discretion because that term does not require "full and open competition," only that there is competition among the entities that are eligible to receive the grants.[92]

7. *Methane Emissions Reduction Program*

IRA Section 60113, Funding agency: Environmental Protection Agency

Section 60113 of the Inflation Reduction Act amends the Clean Air Act and appropriates $1.55 billion to the Environmental Protection Agency to create "grants, rebates, contracts, loans, and other activities" for the purposes of "providing financial and technical assistance to owners and operators of applicable facilities to prepare and submit greenhouse gas reports, engaging in "methane emissions monitoring," "providing financial and technical assistance to reduce methane and other greenhouse gas emissions from petroleum and natural gas systems, mitigate legacy air pollution from petroleum and natural gas systems, and provide funding" for a substantial list of specific pollution reduction programs.[93] Almost half of the funding is reserved for similar activities at conventional oil wells.[94] The provision permits the funding to be used on a variety of energy-production facilities including offshore rigs, onshore processing facilities, energy storage systems, and transmission pipelines.[95]

The EPA Administrator can reasonably conclude that prioritizing grants and loans to firms that commit to not engaging in stock buybacks. Congress took great pains with this IRA provision to outline the types of projects that these funds could be used for, and a company's decision to conduct share repurchases with these funds or with funds freed up by their receipt of these funds would be

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[89] 42 U.S.C. § 7433.
[90] 42 U.S.C. § 7433(d)(1).
[91] Courts have repeatedly found the fungibility of money to be legally significant. *See, e.g., Holder v. Humanitarian L. Project*, 561 U.S. 1, 31 (2010) (explaining that the fungibility of money justifies restricting donations to support terrorist organizations' lawful activities); *United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1158 (2d Cir. 1986) (explaining that, because money is fungible, "credit resulting from a deposit of drug money may arguably constitute traceable proceeds.").
[92] *Dynamic Educ. Sys., Inc. v. United States*, 109 Fed. Cl. 306, 321 (2013).
[93] *See* IRA § 60113.
[94] IRA § 60113.
[95] *Id.*

contrary to the purposes of the IRA provision and those of the Clean Air Act generally. The EPA adopted the Office of Management and Budget's ("OMB") uniform grant requirements, which direct the funding agency to design grant programs "with clear goals and objectives that facilitate the delivery of meaningful results consistent with the Federal authorizing legislation of the program."[96] The EPA's decision to prioritize companies that commit to not engaging stock buybacks would further the grant provision's purpose laid out in the IRA.

8. *Clean Heavy-Duty Vehicles*

IRA Section 60101, Funding agency: Environmental Protection Agency

Section 60101 of the Inflation Reduction Act appropriates $1 billion for the Administrator of the Environmental Protection Agency to provide rebates for various purchases including: "(1) the incremental costs of replacing an eligible vehicle that is not a zero-emission vehicle with a zero-emission vehicle, as determined by the Administrator based on the market value of the vehicles; (2) purchasing, installing, operating, and maintaining infrastructure needed to charge, fuel, or maintain zero-emission vehicles; (3) workforce development and training to support the maintenance, charging, fueling, and operation of zero-emission vehicles; and (4) planning and technical activities to support the adoption and deployment of zero-emission vehicles."[97] The Administrator can disburse these funds to "eligible contractors," which include contractors that have "the capacity— (A) to sell, lease, license, or contract for service zero-emission vehicles, or charging or other equipment needed to charge, fuel, or maintain zero-emission vehicles, to individuals or entities that own, lease, license, or contract for service an eligible vehicle; or (B) to arrange financing for such a sale, lease, license, or contract for service."[98]

As evidenced by the specific statutory language, the IRA's purpose in establishing this grant program is clear. Any deviation of funds from that purpose would run contrary to Congressional intent. The purpose of the program is to increase the use of clean heavy-duty vehicles in the nation's fleet, so the EPA should ensure that no funds are going towards supplanting pre-planned investments for the purpose of engaging in stock buybacks.

9. *Additional Agricultural Conservation Investments: Environmental Quality Incentives Program and Conservation Stewardship Program*

IRA Section 21001, Funding agency: Department of Agriculture

Section 21001 of the Inflation Reduction Act appropriates an additional $11.7 billion for two pre-existing grant programs under the Food Security Act: the Environmental Quality Incentives Program and the Conservation Stewardship Program.

The Environmental Quality Incentives Program empowers the Secretary of Agriculture to provide grants to "governmental and non-governmental organization and persons" to carry out projects that, among other things, "provide environmental and resource conservation benefits through increased participation by producers of specialty crops," "facilitate on-farm conservation research and demonstration activities," and "facilitate pilot testing of new technologies or innovative conservation

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[96] 2 C.F.R. § 200.202.
[97] *See* IRA § 60101.
[98] *Id.*

practices."[99] Additionally, the Secretary of Agriculture can make grants to "a third-party private entity the primary business of which is related to agriculture" for the purpose of running innovation trials.[100]

The Conservation Stewardship Program allows the Secretary of Agriculture to make grants to food producers to "undertak[e] … conservation activities" and "improv[e], maintain[], and manag[e] existing conservation activities.[101]

As with other grant programs, the IRA and the Food Security Act provide direct mandates to the Secretary of Agriculture, specifying acceptable uses of the federal grant money. To the extent that public companies apply, the Department of Agriculture can make well-reasoned decisions to prioritize applications from those that commit not to engage in share repurchase programs. Allowing a company to use federal funds – or funds freed up from existing commitments by the receipt of such federal funds – towards stock buybacks runs directly counter to the specific purpose of the grant program. In addition to how well it furthers the purposes of the grant provision, the statutory language creating the Conservation Stewardship Program also explicitly directs that grant applications be ranked based on "consistent criteria, as determined by the Secretary."[102] This reaffirms the Secretary's authority to ensure that taxpayer money is used for the purposes outlined in the statute, rather than enriching shareholders.

[99] 16 U.S.C. § 3839aa–8(a)(2).
[100] 16 U.S.C. §§ 3839aa–8(c), 3839aa–8(c)(1)(A)(i).
[101] 16 U.S.C. § 3839aa–22(a).
[102] *Id.*

GOVERNING FOR IMPACT