

Client Alert: SEC Stays the Effectiveness of the Share Repurchase Disclosure Modernization Rule Following Fifth Circuit Decision

Publications

November 28, 2023

By: Brian R. Boch, Alexander J. May, Joseph P. Gromacki, Hannah Schwab

On November 22, 2023, the US Securities and Exchange Commission (SEC), issued an order^[1] (Stay Order) staying the effectiveness of the SEC's Share Repurchase Disclosure Modernization rule^[2] (Repurchase Rule) pending further SEC action. This step by the SEC follows an opinion issued on October 31, 2023, by the US Court of Appeals for the Fifth Circuit (Fifth Circuit) in *Chamber of Commerce of the United States of America et al. v. SEC*, in which the court found that the SEC had acted arbitrarily and capriciously when it failed to respond to the petitioners' comments under notice and comment rulemaking procedures and failed to conduct a proper cost-benefit analysis in connection with the adoption of the Repurchase Rule, all in violation of the Administrative Procedure Act, and remanded the matter with direction to the SEC to correct the defects in the Repurchase Rule by November 30, 2023.^[3]

As discussed in more detail in our previous client alert linked here, the SEC's adoption of the Repurchase Rule on May 3, 2023, which became effective on July 31, 2023, increased the amount of disclosure an issuer must provide regarding its repurchases of its equity securities that are registered under the Securities Exchange Act of 1934 (Exchange Act) by, among other things, requiring an issuer to:

- Report issuer share repurchase data (aggregated on a daily basis) in a new table filed as a new "Exhibit 26" to its Form 10-K and Form 10-Q filings (or on a new quarterly Form F-SR filing in the case of foreign private issuers (FPIs));
- Under a revised Item 703 of Regulation S-K, provide additional new narrative disclosures in its Form 10-K and Form 10-Q filings (or Form 20-F filings in the case of FPIs) regarding (1) the objectives or rationales for the issuer's share repurchase plans or programs and the process or criteria used to determine the amount of repurchases and (2) any policies and procedures relating to purchases and sales of the issuer's securities by its officers and directors during a repurchase program;

- Include a checkbox above its tabular disclosures on Exhibit 26 and Form F-SR indicating whether any of the issuer’s officers or directors who file Section 16 reports (or, for FPIs, any of its directors or members of senior management who would be identified pursuant to Item 1 of Form 20-F) purchased or sold shares that are registered pursuant to Section 12 of the Exchange Act and subject of an issuer share repurchase plan or program within four business days before or after (1) the issuer’s announcement of that repurchase plan or program or (2) the announcement of an increase of an existing repurchase plan or program; and
- Under a new Item 408(d) of Regulation S-K, include new disclosures about the issuer’s adoption or termination of any “Rule 10b5-1 trading arrangement” i.e., a plan intended to satisfy the affirmative defense conditions of Rule 10b5-1(c) in its Form 10-K and Form 10-Q filings.

The Repurchase Rule was scheduled to go into effect for domestic issuers beginning with their first Form 10-K or Form 10-Q filing that covers the first full fiscal quarter that begins on or after October 1, 2023 (i.e., the 2023 Form 10-K for typical calendar year-end companies). For FPIs that file on the FPI forms, the Repurchase Rule was scheduled to go into effect beginning with their new Form F-SR that covers the first full fiscal quarter that begins on or after April 1, 2024 and the first Form 20-F filed after their first Form F-SR had been filed.

The SEC’s Stay Order halts the effectiveness of the Repurchase Rule indefinitely pending further SEC action. Additionally, on November 22, 2023, the SEC filed a motion with the Fifth Circuit requesting an extension of the period of the remand (without the rule being vacated in the meantime) pending further action by the SEC to remedy the defects in the Repurchase Rule that had been identified in the Fifth Circuit’s October 31, 2023 opinion.^[4] The SEC stipulated that, if the Fifth Circuit grants the requested extension, the SEC will provide an update within 60 days of the Fifth Circuit doing so on the status of the SEC’s efforts to remedy the Repurchase Rule’s defects.^[5] The SEC’s motion also noted that petitioners’ counsel indicated that petitioners are opposed to the requested extension.^[6]

While it is unclear if or when the SEC will act to correct the deficiencies identified by the Fifth Circuit in the Repurchase Rule, issuers could nonetheless consider continuing to prepare for compliance with the Repurchase Rule so that they can be fully prepared for compliance if the Repurchase Rule ever comes back into effect. Issuers should also be aware that other separate and pre-existing share repurchase disclosure requirements are not affected by the Fifth Circuit’s opinion and continue in effect. These continuing rules require issuers to disclose in their Form 10-K and Form 10-Q filings, among other things:

- Certain information, aggregated on a monthly basis, regarding purchases made by or on behalf of the issuer or any affiliated purchaser during the most recently completed quarter of shares of any class of the issuer’s equity securities registered under Section 12 of the Exchange Act (or Form 20-F on an annual basis for FPIs that report on the FPI forms);

- Certain key terms of all the issuer’s publicly announced repurchase plans or programs; and
- Certain information regarding the use of any “Rule 10b5-1 trading arrangement” and/or “non-Rule 10b5-1 trading arrangement” during the last fiscal quarter by directors or certain specified officers (for further discussion regarding the Rule 10b5-1 disclosure requirements, see our previous client alert linked here).

Jenner & Block will continue to monitor new developments regarding the Repurchase Rule. Jenner & Block is also pleased to counsel its clients regarding the implications of the matters discussed in this client alert.

Footnotes

[1] See In the Matter of Share Repurchase Disclosure Modernization, Order Issuing Stay, Securities Exchange Act of 1934 Release No. 34-99011 (Nov. 22, 2023), available at <https://www.sec.gov/files/rules/other/2023/34-99011.pdf>.

[2] See Share Repurchase Disclosure Modernization, Rel. No. 34-97424 (May 3, 2023), 88 Fed. Reg. 36002 (June 1, 2023).

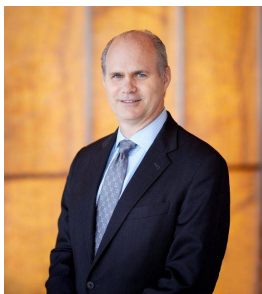
[3] See *Chamber of Com. of the USA, et al. v. SEC*, 85 F.4th 760 (5th Cir., Oct. 31, 2023).

[4] See Motion of Respondent Securities and Exchange Commission to Extend Remand Period at 2, *Chamber of Com. of the USA, et al. v. SEC*, 85 F.4th 760 (5th Cir., Oct. 31, 2023) (No. 23-60255), filed on Nov. 22, 2023.

[5] *Id.*

[6] *Id.*

Related Attorneys



Brian R. Boch

Partner

bboch@jenner.com

+1 312 923 2880



Alexander J. May

Partner

amay@jenner.com

+1 312 840 8659



Joseph P. Gromacki

Partner

jgromacki@jenner.com

+1 312 923 2637



Hannah Schwab

Associate

hschwab@jenner.com

+1 312 840 7331

Related Capabilities

Corporate

Securities and Capital Markets

on legal matters and/or firm news of interest to our clients and colleagues. Readers or attendees should seek specific legal advice before taking any action with respect to matters mentioned in this publication or at this event. The attorney responsible for this communication is Brent E. Kidwell, Jenner & Block LLP, 353 N. Clark Street, Chicago, IL 60654-3456. Prior results do not guarantee a similar outcome. Jenner & Block London LLP, an affiliate of Jenner & Block LLP, is a limited liability partnership established under the laws of the State of Delaware, USA and is authorised and regulated by the Solicitors Regulation Authority with SRA number 615729. Information regarding the data we collect and the rights you have over your data can be found in our Privacy Notice. For further inquiries, please contact dataprotection@jenner.com.

Stay Informed

