

Client Alert: Fifth Circuit Court of Appeals Vacates the SEC's Share Repurchase Disclosure Modernization Rule Amendments

Publications

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On December 19, 2023, the US Court of Appeals for the Fifth Circuit (Fifth Circuit) issued a decision^[1] vacating the share repurchase disclosure modernization rule amendments that the US Securities and Exchange Commission (SEC) adopted on May 3, 2023^[2] (Repurchase Disclosure Rule Amendments), and reiterating the Fifth Circuit's holding from its earlier October 31, 2023 decision^[3] that the SEC had acted arbitrarily and capriciously, in violation of the Administrative Procedure Act, when it failed to respond to the petitioners' comments and failed to conduct a proper cost-benefit analysis in connection with the SEC's adoption of the Repurchase Disclosure Rule Amendments.

After the SEC adopted the Repurchase Disclosure Rule Amendments in May 2023, the Chamber of Commerce of the United States of America, the Longview Chamber of Commerce, and the Texas Association of Business filed a lawsuit challenging the Repurchase Disclosure Rule Amendments. On October 31, 2023, the Fifth Circuit issued its initial decision finding that the SEC had acted arbitrarily and capriciously in adopting the Repurchase Disclosure Rule Amendments, but – short of vacating the rule at that time – the Fifth Circuit remanded the matter with direction to the SEC to correct the defects in its original rulemaking by November 30, 2023. On November 22, 2023, the SEC issued an order^[4] staying the effectiveness of the Repurchase Disclosure Rule Amendments pending further SEC action to remedy the rulemaking defects and filed a motion with the Fifth Circuit requesting an extension of the 30-day remand period. The Fifth Circuit denied the SEC's motion to extend the remand period on November 26, 2023. Following the expiration of the 30-day remand period, the SEC notified the Fifth Circuit on December 1, 2023 that it was unable to correct the rulemaking defects by November 30, 2023. The petitioners then filed a motion to vacate the Repurchase Disclosure Rule Amendments, and the Fifth Circuit granted that motion on December 19, 2023.

As discussed in more detail in our previous client alert linked here, the now-vacated Repurchase Disclosure Rule Amendments originally adopted in May 2023 would have increased the amount of

disclosure an issuer needed to make 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 to 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.

As a result of the Fifth Circuit’s decision, the Repurchase Disclosure Rule Amendments have been vacated and are no longer in effect, and issuers will not need to comply with them at this time. It is unclear whether the SEC will appeal the Fifth Circuit’s decision, or when, if ever, the SEC will propose a new version of the now vacated (and already stayed) Repurchase Disclosure Rule Amendments.

However, issuers should be mindful that there were other separate and pre-existing share repurchase disclosure requirements in effect prior to the SEC’s adoption of the now vacated Repurchase Disclosure Rule Amendments. We believe that, unless the SEC issues any guidance to the contrary, all of these pre-existing rules will continue in effect and will continue to 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;

- Certain key terms of all of 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 Rule 10b5-1 disclosure requirements, see our previous client alert linked here).

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

Footnotes

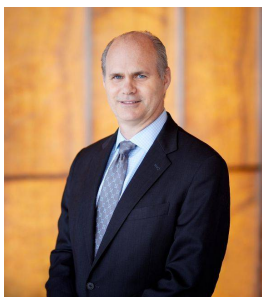
[1] See *Chamber of Com. of the USA, et al. v. SEC*, Docket No. 23-60255 (5th Cir., Dec. 19, 2023).

[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 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>.

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