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Client Insight: Fifth Circuit Panel Vacates SEC's New Share Repurchase Disclosure Rules

Posted in: Disclosure Requirements, SEC, Share Repurchases
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Public companies remain required to report share repurchase information consistent with existing requirements

On December 19, 2023, a panel of the U.S. Court of Appeals for the Fifth Circuit vacated the share repurchase disclosure rules adopted by the U.S. Securities and Exchange Commission (SEC) in May 2023. The rules would have imposed new and expanded quantitative and qualitative disclosure obligations on public companies about repurchases of their equity securities (commonly referred to as buybacks), including quarterly reporting in Form 10-K and Form 10-Q reports of daily share repurchase activity and company Rule 10b5-1 trading plans used to execute share repurchases.

For calendar-year-end public companies (including emerging growth companies and smaller reporting companies), compliance with the enhanced disclosure requirements was set to begin in the next Form
10-K, covering any share repurchases made, and any company 10b5-1 share repurchase plans adopted, materially modified or terminated, during the fourth quarter of 2023.

In light of the court's decision invalidating the rules, public companies with share repurchase activity should instead continue to prepare disclosures for upcoming filings that are consistent with the SEC's existing share repurchase

reporting framework, including the quarterly disclosure of repurchase data aggregated at the monthly level.

Background

As discussed in our earlier client alert, the new rules would have required public companies to report additional details about their share repurchases and prices of such repurchases on a quarterly basis, including:

- Tabular disclosure of quantitative share repurchase data aggregated on a daily basis (instead of on a monthly basis, as currently required);
- Checkbox disclosure of director and Section 16 officer trades in the company's securities within four business days before or after share repurchase announcements;
- Expanded narrative disclosures regarding the company's objectives or rationales for conducting share repurchases; the process or criteria used to determine the repurchase amounts; and any policies and procedures relating to director and officer trading in the company's securities during the pendency of repurchase programs (including any restrictions on such transactions); and
- Disclosure regarding the company's adoption, material modification or termination of 10b5-1 plans used to facilitate share repurchases and their material terms (other than price).

Legal Challenge and Vacatur

The rules were challenged shortly after their adoption in a lawsuit filed by a coalition of industry groups led by the U.S. Chamber of Commerce seeking to block their implementation. On October 31, 2023, a three-judge panel of the Fifth U.S. Circuit Court of Appeals ruled that the SEC acted "arbitrarily and capriciously" in adopting the rules, in violation of the Administrative Procedure Act, by failing to conduct a proper cost-benefit analysis or to respond to significant comments about the rules' economic justifications submitted by the business groups during the public comment period. The court concluded that the SEC had not established its threshold proposition that opportunistic or improperly motivated stock buybacks are "genuine problems" for investors and, therefore, could not adequately substantiate the rules' primary purported benefit or justify their costs.

Rather than invalidating the rules immediately, the court directed the SEC to cure the identified deficiencies within 30 days (by November 30). The SEC subsequently stayed the rules and requested an indefinite extension of the remediation period to

address the court's concerns, but the court denied the agency's request. On December 1, the SEC's Office of the General Counsel informed the court that it was unable to correct the defects in the rules within the prescribed timeframe, culminating in the court's December 19 decision to vacate the rules. In response to the judgment, the U.S. Chamber of Commerce released a statement lauding its victory as "a big win for American businesses, investors and retirees over government micromanagement" and one that it hopes "will cause the SEC to take pause before it attempts to move forward on its more far-reaching and aggressive agenda."

Next Steps

The SEC could decide to appeal the court's decision (seeking either a panel rehearing or rehearing en banc); attempt to craft a new share repurchase disclosure proposal that is responsive to the Fifth Circuit's concerns; or abandon the rulemaking effort. As of the time of publication, the SEC had not issued a statement regarding the court's ruling or its future course of action.

In any case, the rules in the form adopted earlier this year will not be implemented any time soon (if ever). Public companies should instead continue to report share repurchase information in their upcoming periodic reports consistent with the SEC's existing requirements, including repurchase data aggregated on a monthly basis.

While companies no longer need to prepare disclosures about their own 10b5-1 share repurchase plans, the analogous quarterly disclosure obligations now in effect regarding the use and material terms of pre-planned trading arrangements by company directors and Section 16 officers remain operative, as they were adopted as part of the SEC's December 2022 insider trading-related ruleset (discussed in our previous client alert).

If you have questions or would like more information about the contents of this alert, please reach out to any member of our Public Companies team or your regular Gunderson Dettmer attorney.

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