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Securities Alert

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The Fifth Circuit Court of Appeals vacates the SEC's amendments on share repurchase disclosures

By Lloyd H. Spencer

The SEC's adopted final rules that would have required issuers to provide additional information on share repurchases, including daily repurchase activity disclosed quarterly and the adoption and termination of Rule 10b5-1 trading plans by the issuer, have been vacated by the United States Court of Appeals for the Fifth Circuit.



What's the Impact

- / Public companies will not need to comply with the revised share repurchase disclosure requirements in their upcoming Form 10-K and Form 10-Q.
- / Public companies should continue to comply with the current share repurchase disclosure requirements, which require monthly reporting for shares repurchased during the quarter.
- / The court's ruling does not impact the recently effective rules regarding disclosure of 10b5-1 plans adopted or terminated by directors and officers.

On May 3, 2023, the U.S. Securities and Exchange Commission (SEC) adopted amendments requiring certain additional disclosures related to an issuer's share repurchases. The

amendments would have required domestic issuers, including smaller reporting companies, to disclose in their periodic reports, in tabular format, information—including the amount and price of shares repurchased and the aggregate total number of shares purchased in transactions intended to qualify for the safe harbor in Rule 10b-18 and/or to satisfy the affirmative defense conditions of Rule 10b5-1(c)—for each day during the reported quarter. The new rules also would have required narrative disclosure of the objectives or rationales for each repurchase plan or program and the process or criteria used to determine the amount of repurchases, as well as descriptions of any policies and procedures relating to purchases and sales of the issuer’s securities during a repurchase program by its officers and directors, including any restriction on such transactions. Foreign private issuers (FPIs) would have been required to file a new Form F-SR at the end of every quarter within 45 days after the end of such FPIs’ fiscal quarter.

The new rules were challenged in court shortly after their adoption. On October 31, 2023, the Fifth Circuit issued an opinion holding that the SEC had acted arbitrarily and capriciously in violation of the Administrative Procedures Act by failing to respond to petitioners’ comments and conduct a proper cost-benefit analysis. The SEC was directed to correct the defects within 30 days. On November 22, 2023, the SEC issued an order staying the effective date of the new rules and requested more time from the court to correct the deficiencies, which was denied. The SEC was unable to correct the deficiencies within the 30 days allotted by the court, and the petitioners filed a motion to vacate the new rules. The court granted the motion.

While the SEC could appeal the Fifth Circuit’s decision or repropose the rules, public companies will not have to comply with the new rules in their upcoming periodic reports, including the annual report on Form 10-K.

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