

Fifth Circuit Vacates SEC Rules for Share Repurchase Disclosure

by Cam C. Hoang

We had previously reported that beginning with the next annual report on Form 10-K, most US-listed issuers would be required to make more extensive disclosures on their share repurchase programs and insider transactions proximate to a program's announcement, pursuant to the final rules for these disclosures adopted by the Securities and Exchange Commission. These rules were subsequently challenged in court by petitioners, namely, the U.S. Chamber of Commerce, the Texas Association of Business and the Longview Chamber of Commerce.

The Fifth Circuit, in its opinion in *Chamber of Com. of the USA v. SEC*, No. 23-60255 (5th Cir.), held that the SEC acted arbitrarily and capriciously, in violation of the Administrative Procedures Act, when it failed to respond to petitioners' comments and failed to conduct a proper cost-benefit analysis in connection with the adoption of the rules. The Fifth Circuit rejected the SEC's arguments that the rules' economic effects were unquantifiable and noted that the petitioners had cited data that could form the basis for such an analysis.

The Fifth Circuit ordered the SEC to correct the defects by November 30, 2023, and refused the SEC's request for an extension of this deadline. The SEC was unable to produce a satisfactory cost-benefits analysis by this date, and subsequently in response to a motion by petitioners, the Fifth Circuit vacated the rules in their entirety on December 19, 2023.

Implications for Upcoming SEC Filings

Issuers will not be required to comply with the vacated rules' expanded share repurchase disclosure requirements and issuer Rule 10b5-1 plan disclosure requirements. Existing share repurchase disclosure requirements in Item 703 of Regulation S-K, as well as the director and officer insider trading disclosure requirements in Item 408(a)-(c) of Regulation S-K, remain applicable for quarterly and annual reports.

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Potential next steps for the SEC include an appeal of the Fifth Circuit's decision. Alternatively, the SEC may propose new rules, with an updated cost-benefit analysis and potentially with amendments to the disclosure requirements in the vacated rules, an approach that would remain consistent with the modernization initiatives recently undertaken by the SEC.