Update to SEC Share Repurchase Disclosure Amendments: Fifth Circuit Vacates SEC New Repurchase Rule

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On December 19, 2023, the U.S. Court of Appeals for the Fifth Circuit vacated the Securities and Exchange Commission’s (the “SEC”) final rule adopting amendments to share repurchase disclosure requirements (US Chamber of Commerce v. SEC, (5th Cir. December 19, 2023)).

In light of the decision, issuers will not be obligated to comply with the changes to reporting relating to share repurchases set forth in the SEC’s Share Repurchase Disclosure Modernization rule (the “Rule”) that were previously scheduled to take effect with respect to periodic reports due in early 2024.

Background

The SEC approved the Rule on May 3, 2023. The Rule sought to introduce new tabular disclosures regarding daily transaction data, revise existing disclosures, and create new disclosures regarding Rule 10b5-1 trading plans, including providing daily quantitative repurchase data at the end of every quarter and disclosing the rationale for repurchasing shares. Issuers were to begin compliance with the Rule in their upcoming Forms 10-K and 10-Q filings covering the fiscal quarter beginning on or after October 1, 2023, but during the course of the challenge, the SEC stayed the Rule on November 22, 2023 before it was ultimately vacated.

The petition for review, Chamber of Com. of the U.S. v. SEC, was initiated on May 12, 2023 by the U.S. Chamber of Commerce, the Longview Chamber of Commerce, and the Texas Association of Business (“Petitioners”). Petitioners challenged the Rule’s mandatory disclosure requirements under the U.S. Constitution and the Administrative Procedure Act (the “APA”). The Court was not persuaded by Petitioners’ argument that the Rule’s rationale-disclosure requirement violates the First Amendment by impermissibly compelling speech. However, in its October 31, 2023 opinion, the Court found that the SEC violated the APA by failing to respond to Petitioners’ comments and conduct a proper cost-benefit analysis and directed the SEC to remedy the deficiencies in the Rule by November 30, 2023.

On December 1, 2023, after a request for additional time was denied, the SEC filed a letter stating that it was unable to correct the Rule’s defects within the mandated timeframe. As a result, Petitioners sought that the Rule be vacated and, on December 19, 2023, the Court issued an opinion vacating the Rule. It is unknown whether the SEC will seek permission to appeal to the U.S. Supreme Court or revisit its share repurchase disclosure requirements in future rulemaking.

What This Means for Reporting Companies
The court’s decision means that public companies (including foreign private issuers) do not need to comply with the amended share buyback or the 10b5-1 trading plan disclosure mandate. Instead, companies preparing their upcoming Forms 10-K and 10-Q should continue to provide the share repurchase disclosures required in Forms 10-K and 10-Q and set forth in Regulation S-K, Item 703 in place prior to the Rule.

Attorneys in Kelley Drye’s Corporate Practice Group are available to assist with any questions you may have. For more information, please contact your current Kelley Drye attorney or any member of the Corporate Practice Group.