

Fifth Circuit vacates SEC buyback rule

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After the SEC failed to remedy the deficiencies in the rule that the court had identified in its recent opinion, the Fifth Circuit vacated the share repurchase rule that the SEC adopted in May 2023.

Soon after the SEC adopted its [share repurchase rule](#) in May 2023, the U.S. Chamber of Commerce (along with other petitioners) challenged the rule in federal court. On October 31, 2023, the Fifth Circuit issued an [opinion](#) finding that the “SEC acted arbitrarily and capriciously, in violation of the [Administrative Procedure Act], when it failed to respond to petitioners’ comments and failed to conduct a proper cost-benefit analysis.” The court gave the SEC 30 days to correct deficiencies in the rule, including requiring the SEC to “show that opportunistic or improperly motivated buybacks are a genuine problem,” leaving practitioners and public companies uncertain about the fate of the rule.

After the SEC’s request for more time (opposed by the petitioners) was denied by the court, the SEC advised the court that it was unable to address the deficiencies. Petitioners then filed a motion requesting that the court vacate the rule, and on December 19, the court [vacated](#) the SEC’s share buyback rule.

The court’s decision means that public companies (including foreign private issuers) do not need to comply with the share buyback disclosure mandate – and this includes all the new requirements under the share repurchase [adopting release](#). In addition to the tabular disclosure of daily stock repurchases (as an exhibit for domestic issuers and new Form F-SR for foreign private issuers) and related narrative disclosure about a company’s rationale for repurchases, the court decision does away with the requirement to disclose issuer 10b5-1 plans and to indicate whether any directors or officers traded shares that are the subject of an issuer share repurchase plan within four business days before or after the announcement of that plan.

It remains to be seen what action the SEC will take in response to the court’s decision or whether this will impact the SEC’s approach to its regulatory agenda. Companies of course already have their hands full with other disclosure mandates and considerations for the upcoming annual reporting season, which we discuss in our client updates [Your 2023 Form 10-K roadmap](#) and [Preparing your 2023 Form 20-F](#).

If you have any questions regarding the matters covered in this publication, please reach out to any of the lawyers listed below or your usual Davis Polk contact.

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