

Fifth Circuit Vacates SEC Share Repurchase Rules

December 20, 2023

On December 19, 2023, the Fifth Circuit vacated the Share Repurchase Disclosure Modernization rules (the “Share Repurchase Rules”) issued by the U.S. Securities and Exchange Commission (the “SEC”), which were originally scheduled to apply to most issuers beginning with the first periodic report on either Form 10-Q or Form 10-K (or Form 20-F) in respect of the first full fiscal quarter that began on or after October 1, 2023. This followed the SEC’s failure to correct the defects identified in an October 31, 2023 decision by the Fifth Circuit in *Chamber of Commerce of the USA vs. SEC* that the SEC violated the Administrative Procedure Act in its rulemaking process by failing to (a) adequately respond to the Chamber of Commerce’s comments and (b) substantiate the Share Repurchase Rules’ benefits. The SEC will now need to restart its rulemaking process if it wishes to implement the Share Repurchase Rules (or a variation thereof).

FREQUENTLY ASKED QUESTIONS

The Fifth Circuit’s *vacatur* of the Share Repurchase Rules means that issuers will not be required to comply with the disclosure requirements of the Share Repurchase Rules. Below are a number of frequently asked questions and answers on the affected disclosure requirements.

Q: Is an issuer required to disclose daily share repurchase information in periodic reports?

A: No, an issuer is no longer required to comply with proposed Item 601(b)(26) of Regulation S-K regarding disclosure of daily share repurchase information in its periodic reports. However, an issuer is required to continue to disclose aggregate monthly repurchase information in its periodic reports under Item 703 of Regulation S-K, as required before the Share Repurchase Rules.

Q: Is an issuer required to include additional narrative disclosures about share repurchase programs and policies in periodic reports?

A: No, an issuer is no longer required to disclose:

- the objectives or rationales for its share repurchases, and the process or criteria employed to determine the amount of repurchases;
- any policies or procedures relating to purchases and sales of the issuer's securities by its directors and officers during a repurchase program, including any restrictions on such transactions; and
- the number of shares purchased other than through a publicly announced plan or program, and the nature of the repurchase transactions (e.g., whether the purchases were made in open market transactions, tender offers, etc.).

Q: Is an issuer required to include checkbox disclosure for director and officer trades in periodic reports?

A: No, an issuer is no longer required to disclose in its periodic reports (by checking a box) whether any of its directors and Section 16 officers purchased or sold registered equity securities that are part of an issuer share repurchase plan or program within four business days before or after the announcement of a repurchase plan or program or the announcement of an increase of an existing share repurchase plan or program.

Q: Is an issuer required to disclose its 10b5-1 trading plans in periodic reports?

A: No, an issuer is no longer required to comply with proposed Item 408(d) of Regulation S-K regarding disclosure of the adoption or termination of any of the issuer's trading plans that are intended to satisfy the affirmative defense conditions of Rule 10b5-1(c) in its periodic reports. However, an issuer is required to continue to disclose the adoption, modification and termination of Rule 10b5-1 and other trading arrangements by directors and officers in its periodic reports under Item 408(a) of Regulation S-K.

For more information about the vacated Share Repurchase Rules, please see our Debevoise Update—[SEC Adopts Share Repurchase Disclosure Rules](#). For more information about *Chamber of Commerce of the USA vs. SEC*, please see our Debevoise Debriefs—[Fifth Circuit Gives SEC 30 Days to Fix Share Repurchase Rules](#) and [SEC Issues Order Postponing Effective Date of Share Repurchase Rules](#). For a list of key considerations issuers should keep in mind this year when preparing their annual reports on Form 10-K or Form 20-F and their proxy statements, please see our Debevoise In Depths—[Key Considerations for the 2023 Annual Reporting Season](#) and [Key Considerations for the 2024 Proxy Season](#).

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Please do not hesitate to contact us with any questions.



Eric T. Juergens
Partner, New York
+1 212 909 6301
etjuergens@debevoise.com



Benjamin R. Pedersen
Partner, New York
+1 212 909 6121
brpedersen@debevoise.com



Steven J. Slutzky
Partner, New York
+1 212 909 6036
sjslutzky@debevoise.com



Alice Gu
Associate, New York
+1 212 909 6057
agu@debevoise.com



Paul D. Lowry
Associate, New York
+1 212 909 6198
pdlowry@debevoise.com