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SEC Unable to Correct Defects of Share Repurchase Disclosure Modernization Rule

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On November 22, the Securities and Exchange Commission (SEC) issued an order postponing the Share Repurchase Disclosure Modernization Rule (the Repurchase Rule). The SEC's announcement followed the U.S. Court of Appeals for the Fifth Circuit's finding that the Repurchase Rule was "arbitrary and capricious" and violated the Administrative Procedure Act.[1] The Fifth Circuit demanded that the SEC "correct the defects" in the Repurchase Rule by November 30. Thus, the Repurchase Rule was momentarily stayed pending further SEC action.

To extend the November 30th deadline, the SEC submitted a motion to the Fifth Circuit requesting an additional 60 days to provide an update on the Repurchase Rule. The Fifth Circuit denied the request.

On December 1, the SEC submitted a letter to the Fifth Circuit stating it was unable to "correct the defects" of the rule. Because the SEC was unable to address the issues in the Repurchase Rule, the Fifth Circuit will vacate the agency rule.

The future of the Repurchase Rule lies with the SEC. The Commission will either appeal the decision or attempt to promulgate a new share repurchase proposal to address the defects identified by the Fifth Circuit. In either case, the Repurchase Rule will not apply to the upcoming annual report season. Companies should continue to follow the current rules to report quarterly repurchases in their upcoming Form 10-Ks and 10-Qs.

Information regarding the implications of the Fifth Circuit's decision and more information on the Repurchase Rule can be found here and here, respectively.

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[1] Chamber of Com. of the USA vs. SEC, No. 23-60255 (5th Cir. 2023).

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