

FIFTH CIRCUIT PANEL REJECTS SEC REQUEST FOR ADDITIONAL TIME TO SUBSTANTIATE NEW STOCK REPURCHASE DISCLOSURE RULES

Nov 27, 2023

As readers may recall, on October 31, 2023 the Fifth Circuit Court of Appeals in *Chamber of Commerce v. SEC* ruled that the SEC acted arbitrarily and capriciously, in violation of the Administrative Procedure Act, when it adopted the new share repurchase disclosure rules in May 2023, and remanded the matter to the SEC with direction to cure the deficiencies within 30-days (see our prior blog post available [here](#)). On November 22, 2023, the SEC filed a motion with the Fifth Circuit requesting an extension of the 30-day period provided to allow additional time to correct the defects. On the same date, the SEC also announced a stay of the new disclosure rules, pending further SEC action. On November 26, 2023, the Fifth Circuit issued an order denying the SEC's request.

It is important to note that the stay only impacts disclosures regarding an issuer's stock repurchases. It does not affect the new quarterly disclosure rules regarding the use of Rule 10b5-1 trading plans by an issuer's directors and officers. Those disclosures were first required for issuers with a December 31 fiscal year end commencing in the Form 10-Q for the period ended June 30, 2023 –excluding smaller reporting companies, for which initial disclosures are required for the quarterly period ending December 31, 2023. For information regarding the issuer disclosure requirements for director and officer Rule 10b5-1 trading plans and related matters, see our prior blog post available [here](#).

SEC November 22 motion. The SEC's motion stated that the "staff has worked diligently to ascertain the steps necessary to comply with the Court's remand order and has determined that doing so will require additional time." Additionally, it indicated that, if the extension were granted, the SEC would provide an update to the Fifth Circuit within 60 days of the court's action regarding the SEC's efforts to remediate the new stock repurchase disclosure rules.

Chamber November 24 response. On November 24, 2023, the Chamber of Commerce filed a motion in opposition to the SEC's request for additional time. The Chamber argued that:

- The SEC’s “bare-bones motion” confirms that it has not and cannot remedy the defects in the new disclosure rules, and that the SEC provided no explanation what progress it has made, what work remains to be completed and no timetable for completion.
- The Fifth Circuit had already given the SEC sufficient time to remedy the defects, and that the SEC did not sufficiently justify a further indefinite extension.
- If the SEC believes it can overcome the defects in the new disclosure rule, it can repropose the new disclosure rules.

Finally, the Chamber of Commerce requested that the Fifth Circuit confirm that the new disclosure rules be vacated following the expiration of the 30-day remand period (December 1, 2023), so that issuers will not be left wondering when the SEC may require compliance with the new disclosure requirements. The Fifth Circuit’s November 26, 2023 order did not provide such confirmation and, accordingly, the fate of the rule will be uncertain if the SEC fails to cure the deficiencies by November 30, 2023.

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