

# Client Alert

Corporate Governance

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For more information,  
contact:

Elizabeth Morgan  
+1 212 556 2351  
emorgan@kslaw.com

Zachary J. Davis  
+1 404 572 2770  
zdavis@kslaw.com

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King & Spalding

New York  
1185 Avenue of the Americas  
34th Floor  
New York, New York 10036  
Tel. +1 212 556 2100

Atlanta  
1180 Peachtree Street, NE  
Suite 1600  
Atlanta, Georgia 30309  
Tel. +1 404 572 4600

## New Share Repurchase Rules on Ice Following Fifth Circuit Decision

As a result of a recent decision by the Fifth Circuit Court of Appeals, the SEC's previously adopted Share Repurchase Disclosure Modernization Rule has been put on hold. While the SEC may appeal the final decision (if and when issued), or alternatively draft a new rule that addresses defects identified by the Fifth Circuit, issuers can halt plans for disclosing daily repurchase information, at least for the time being.

### *Background*

On October 31, 2023, the Fifth Circuit Court of Appeals issued an opinion in *Chamber of Commerce of the USA v. SEC*, granting the Chamber's petition for review of the SEC's Share Repurchase Disclosure Modernization Rule, which was adopted by the SEC on [May 3, 2023](#), with compliance dates for most issuers beginning with the Form 10-Q or Form 10-K report for the first full fiscal quarter beginning on or after October 1, 2023. The Fifth Circuit ruled that the SEC acted "arbitrarily and capriciously" in violation of the APA, when it failed to respond to petitioners' comments and failed to adequately conduct a cost-benefit analysis for the rule. Nonetheless, instead of vacating the rule, the Fifth Circuit remanded the rule for 30 days to allow the SEC to "remedy the deficiencies in the rule," recognizing the possibility that the SEC may be able to "substantiate its decision given an opportunity to do so." The Fifth Circuit retained jurisdiction to consider the decision made on remand, with a deadline set for November 30, 2023.

On November 22, 2023, the SEC issued an order postponing the effective date of the Share Repurchase Disclosure Modernization rule, and the rule was stayed pending further SEC action. On the same day, the SEC filed a motion asking the Fifth Circuit for an extension of time to correct the defects. The Chamber filed a response to the SEC's motion, in which it contended that the Fifth Circuit had already given the SEC "ample opportunity" to save the rule, and noted that the SEC had made "no



attempt” in its “bare-bones motion” to explain what progress it had made since the Fifth Circuit’s initial ruling. Siding with the petitioners, on November 26, 2023, the Fifth Circuit denied the SEC’s motion to extend the period of the remand pending further action by the SEC to remedy the defects.

On December 1, 2023, the SEC’s Office of General Counsel submitted a letter to the Fifth Circuit informing the court that the SEC was unable to correct the defects in the rule within the prescribed time period. As a result, the Fifth Circuit is expected to vacate the rule.

*Next Steps*

With the November 30, 2023 deadline for the SEC to “remedy the deficiencies in the rule” having already come to pass, the SEC may now either appeal the Fifth Circuit’s ruling (assuming a final order vacating the rule is in fact issued) or, alternatively, start from scratch with a new proposal for a share repurchase rule (that addresses the defects identified by the Fifth Circuit). Either way, it does not look like any new repurchase rules will be effective for the foreseeable future.

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