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### Fifth Circuit Orders SEC to Fix “Arbitrary & Capricious” Share Repurchase Rule



Last week, the Fifth Circuit dealt the SEC a blow by ruling that the share repurchase disclosure rules it adopted back in May were "arbitrary and capricious" under the Administrative Procedure Act in response to a challenge brought by the U.S. Chamber of Commerce. Under the [court's order](#), the SEC has 30 days to try to fix the defects in the rule.

The Chamber of Commerce succeeded on two arguments:

1. The SEC failed to respond to the Chamber's comments submitted in the rulemaking process, which provided suggestions of ways in which the SEC could quantify costs and benefits related to the rules.
2. The SEC failed to adequately substantiate the rule's costs and benefits.

Both arguments go to substantiation of the rule. As summarized in the opinion "If opportunistic or improperly motivated buybacks are not genuine problems, then there is no rational basis for investors to experience any of the uncertainty the SEC now claims warrants the rule."

The court also rejected challenges that the rulemaking violated the First Amendment by impermissibly compelling speech, and that the length of the SEC's 45-day comment period was inadequate.

The compliance date of the rule is nearly upon us, so the SEC will need to act quickly – either to fix the defects to the satisfaction of the Fifth Circuit or seek Supreme Court review of the Fifth Circuit's holding. If the SEC submits a revised rulemaking, we'll have to wait and see whether the Fifth Circuit is satisfied with the revisions (and whether the currently anticipated effective date remains in place or is postponed) or vacates the rule altogether.

Most companies have been expecting to make these tabular and narrative disclosures beginning with the first filing that covers the first full fiscal quarter that begins on or after October 1, 2023 – for those that use calendar

quarters, that is the 10-Q or 10-K for the quarter ending December 31, 2023. Because the Fifth Circuit remanded the rule to the SEC but did not vacate it, the rule currently remains in effect for now while the Fifth Circuit considers the SEC's revisions.

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