

Update: SEC Stays Effectiveness of New Buyback Rules

Regulatory & Compliance on **November 16, 2023**

In May 2023, the SEC adopted final rules amending disclosure rules for public companies engaged in equity buy-back programs. We have detailed those rules in our client alert available [here](#).

The new rules were challenged in court, and on October 31, 2023, the Fifth Circuit Court of Appeals held that the SEC acted arbitrarily and capriciously, in violation of the Administrative Procedures Act (APA), because it did not respond to petitioners' comments submitted to the SEC on its then-proposed rules, and failed to conduct a proper cost-benefit analysis in adopting final rules. The petitioners' comments suggested ways to obtain relevant data on the costs and benefits of the then-proposed rules.

The court has not invalidated the new rules at this point, but remanded the case, directing the SEC to correct the "defects" in the rule within 30 days of the remand. It is unclear what will happen following this setback for the SEC, and the matter could remain in litigation for months, although the courts should feel pressure to resolve the matter before calendar-year U.S. companies' annual reports on Form 10-K must be filed in February or March of 2024. Annual reports on Form 20-F for foreign private issuers are not due until later in the year.

We recommend that companies continue to prepare for the new disclosure requirements, since the disclosure in annual reports primarily focuses on the status quo as of fiscal year-end, and the litigation may not be resolved until shortly before filings are due. Among other things, we expect many companies to provide additional buy-back disclosure even if the rules are invalidated.

UPDATE: In light of the court's decision, on November 22, 2023, the SEC issued an order postponing the effective date of the new rules. As a result, the rules are stayed pending further Commission action. The SEC's announcement is available [here](#).

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