SEC postpones effective date of share repurchase disclosure rule

At a glance
On November 22, the SEC postponed the effective date of its May 2023 rule amendments that would have required new and expanded disclosures relating to share repurchases. This follows an October 31 appeals court conclusion that the SEC acted in violation of the Administrative Procedure Act and direction that the SEC correct defects in the rule within 30 days. It is unclear at this time when, if, or in what form the rule would become effective as changes may result from these decisions or the rule may even be vacated by the court.

What happened?
In May, the SEC adopted amendments that significantly expanded existing share repurchase disclosure requirements for domestic corporate issuers, foreign private issuers (FPIs), and listed closed-end funds. On October 31, however, an appeals court found that the SEC “failed to respond to petitioners’ comments and failed to conduct a proper cost-benefit analysis” in the final rule under the Administrative Procedure Act. In its opinion, the court stopped short of vacating the rule but instead directed the SEC to remedy deficiencies in the rule within 30 days. On November 22, the SEC issued an order that postpones the effective date of the rule pending further Commission action. On November 26, the court denied an SEC request to extend the 30-day deadline from the court’s October 31 ruling. That 30-day window closed at midnight on November 30.

The May amendments would have required reporting of daily repurchase activity, as well as increased reporting regarding the rationale and objectives for share repurchase plans and governance over such plans. The enhanced disclosures (e.g., daily rather than monthly activity) were intended to provide additional transparency into a reporting entity’s share repurchase activity and provide investors with additional information to assess the purposes and effects of share repurchases. More detail about the May amendments is included in the Appendix.

What’s next?
The effective date of the share repurchase rule is postponed pending further SEC action. The SEC was required to respond to the court by midnight on November 30. It is unclear at this time how or when the court may take any further action. In the interim, entities are required to report share repurchase activity consistent with existing requirements.

To have a deeper discussion, contact:

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Appendix — May 2023 amendments to the share repurchase rule

The amendments would have required additional detail on daily repurchase activity as well as enhanced disclosure about share repurchase plans and 10b1-5 trading arrangements, as discussed below.

Reporting of daily repurchase activity
Tabular disclosure of quantitative daily share repurchase data would have been required to be filed quarterly by domestic corporate issuers and foreign private issuers, and semiannually for listed closed-end funds. For each day the reporting entity (or another party acting on its behalf) purchases its own registered shares, it would have been required to disclose the following:

- class of shares,
- number of shares purchased,
- average price paid per share,
- number of shares purchased under publicly announced plans,
- aggregate maximum number of shares or approximate dollar value that may still be purchased under a publicly announced plan,
- number of shares purchased on the open market,
- total number of shares purchased that are intended to qualify for the safe harbor in Rule 10b-18, and
- total number of shares purchased under a plan that is intended to satisfy the affirmative defense conditions of Rule 10b5-1(c), referred to as a “10b5-1 trading arrangement.”

Reporting entities would also have been required to indicate whether certain officers and directors purchased or sold shares subject to a repurchase plan within four business days of the announcement of the plan.

A domestic corporate issuer or FPI filing on a domestic form would have reported the tabular information in an exhibit to its quarterly and annual reports on Form 10-Q and 10-K. An FPI filing on an FPI form would have reported the information on a new Form F-SR due 45 days following the end of each fiscal quarter. A listed closed-end fund would have included the data in its annual and semi-annual report on Form N-CSR.

Enhanced disclosures about share repurchase plans
Reporting entities would have disclosed additional information to allow investors to better understand the governance and strategies relating to share repurchase plans. Specifically, the disclosure would have included the objectives or rationales for each plan and the process or criteria used to determine the amount of repurchases, and any policies and procedures relating to purchases and sales by officers and directors while a repurchase plan is ongoing.

10b5-1 trading arrangements
Entities reporting on Forms 10-Q and 10-K would have been required to disclose material terms and trading arrangements adopted or terminated during the most recent quarter under a 10b5-1 trading arrangement.

Structured data
The amendments would have required that the share repurchase disclosures be tagged using Inline XBRL.