Securities Regulation Daily Wrap Up, CORPORATE GOVERNANCE—SEC admits it cannot fix Repurchase Rule defects, (Dec. 5, 2023)

Securities Regulation Daily Wrap Up

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By Rodney F. Tonkovic, J.D.

The Commission was unable to correct defects the court identified within the 30-day remand period.

The SEC has informed the Fifth Circuit that it was unable to correct defects in the Share Repurchase Disclosure Modernization rule. At the end of October, the court gave the Commission 30 days to fix the identified defects in the rulemaking. The Commission stayed the effectiveness of the rule, but the court rejected a motion to extend the remand period. It is likely that the court will now vacate the rule.

Repurchase rule. The share repurchase disclosure modernization rule (Release No. 34-97424) was adopted on May 3, 2023 and became effective in July 2023. The first filings under the rule, which requires tabular disclosure of an issuer's purchases of equity securities and the reasons for the repurchase, would have been due after the final quarter of 2023.

Chamber challenge. On October 31, 2023, in response to a challenge brought by the U.S. Chamber of Commerce, the Fifth Circuit Court of Appeals found that the final rule was arbitrary and capricious. The panel said that the Commission failed to respond to petitioners' comments and to conduct a proper cost-benefit analysis. The court also said that the rule's primary benefit of decreasing investor uncertainty was inadequately substantiated. The matter was remanded to the SEC to fix the identified deficiencies by November 30, 2023, and the panel retained jurisdiction to consider the Commission's decision made on remand.

On November 22, 2023, the Commission announced that it had postponed the effective date of the rule, which was then stayed "pending further Commission action." On the same day, the Commission filed a motion asking for an extension of the remand period during which the Commission would provide a status update within 60 days. The Chamber of Commerce opposed the motion, and the panel issued an order denying the extension on November 26.

What's next? On December 1, 2023, the SEC's Office of the General Counsel wrote to inform the court that it was not able to correct the defects in the rule within 30 days. The letter notes that this determination was consistent with the statements in the November 22, 2023 filing, in which the Commission said, without elaboration, that its staff was working diligently to "ascertain the steps necessary" to comply with the remand order, but needed additional time.

In its opinion, the panel said that it was not vacating the rule at that time in order to give the SEC a chance to remedy the deficiencies. Because the Commission has not done so, the court presumably will soon issue an order vacating the rule (the opinion does not explicitly state the consequences). The Commission then has the choice to appeal the decision or issue a new rule, following the required notice and comment procedures. Should the rule be vacated, the existing disclosure requirements for buybacks will remain in place.

The case is No. 23-60255.

Attorneys: Noel John Francisco (Jones Day) for Chamber of Commerce of the United States of America, Longview Chamber of Commerce and Texas Association of Business. Ezekiel Levenson Hill for the SEC.

Companies: Chamber of Commerce of the United States of America; Longview Chamber of Commerce; Texas Association of Business

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