

## [Securities Regulation Daily Wrap Up, CORPORATE GOVERNANCE—SEC stays Repurchase Rule; court denies more time on remand, \(Nov. 27, 2023\)](#)

Securities Regulation Daily Wrap Up

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The SEC has stayed the effectiveness of its repurchase rule and will soon run out of time to.

The SEC issued an order postponing the effective date of its Share Repurchase Disclosure Modernization. At the end of October, the Fifth Circuit concluded that Commission acted arbitrarily and capriciously in adopting the rule and gave the agency 30 days to remedy the identified defects, or the rule will be vacated. On November 26, the court rejected the SEC's motion to extend the remand. The rule is currently stayed pending further Commission action (*In the Matter of Share Repurchase Disclosure Modernization*, [Release No. 34-99011](#), November 22, 2023).

**Repurchase rule.** The Commission adopted the share repurchase disclosure modernization rule ([Release No. 34-97424](#)) by a 3-2 vote on May 3, 2023. The rule requires tabular disclosure of an issuer's purchases of its equity securities for each day that it makes a share repurchase and disclosure of the reasons for the share repurchase. The rule became effective on July 31, 2023, and the first filings governed by it would be due after the final quarter of 2023.

**Arbitrary and capricious.** 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 matter was remanded to the SEC to fix the identified [deficiencies](#) by November 30, 2023 or the rule will be vacated on December 1. The court retained jurisdiction to consider the SEC's decision made on remand.

According to the court, the Commission violated the APA by failing to respond to petitioners' comments and to conduct a proper cost-benefit analysis. The court also said that the rule's primary benefit—decreasing investor uncertainty about motivations underlying buybacks—was inadequately substantiated, and this error infected the entire rule.

**Stay.** On November 22, 2023, the Commission [announced](#) that it has stayed the repurchase rule "pending further Commission action." The order notes that the APA provides that an agency may postpone the effective date of an action pending judicial review if "justice so requires." In light of the Fifth Circuit's decision, the Commission has found "that it is consistent with what justice requires" to stay the effectiveness of the rule.

**Thirty days for the whole.** Recognizing that there was a possibility that the SEC could substantiate its decision, the court gave the agency 30 days to correct the defects in the rule. On November 22, 2023, the Commission filed a [motion](#) seeking to extend the remand period. The motion indicated that Commission staff was working diligently to comply with the remand order but needed additional time. The motion requested an extension of the remand, noting that the stay order issued on the same day would facilitate this relief. If the extension was granted, the Commission would provide a status update within 60 days.

The [Chamber of Commerce](#) opposed the motion, arguing that there was no basis to extend the remand period. The SEC's motion, the Chamber said, did not explain what the Commission has done since October 31 or what remains to be done. The Commission also has not proposed a new deadline—with no deadline, the SEC enjoys the benefit of the rule for as long as it refuses to act, the Chamber remarked. The SEC's "bare-bones motion" does not justify an extension of the remand period, and the Chamber asserted that the Commission effectively admitted that it cannot timely correct the defects. Vacatur will not prejudice the SEC, the Chamber said.

In a terse, unpublished order issued on November 26, 2023, the panel denied the SEC's motion.

The release is [No. 34-99011](#).

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