Securities Regulation Daily Wrap Up, PUBLIC COMPANY REPORTING DISCLOSURE—5th Cir.: Chamber of Commerce to 5th Circuit: vacate SEC's new buyback rule, (Dec. 8, 2023)

Securities Regulation Daily Wrap Up

Click to open document in a browser

By Jay Fishman, J.D.

The Chamber of Commerce remarked that under the law-of-the-case doctrine, vacatur is compelled by implication.

The U.S. Chamber of Commerce filed a petition with the Court of Appeals for Fifth Circuit requesting the court to vacate the SEC's final Share Repurchase Disclosure Modernization Rule. The Chamber proclaimed that the Court's November 26, 2023, decision denying the Commission's motion to extend the 30-day deadline for correcting the rule's defects is tantamount to vacating the rule, and must be done. The Chamber reiterated the material nature of the defects and that allowing the rule to go into effect as is would cause serious disruptions for the Chamber and issuers by forcing them to comply with vague disclosure requirements in short order. The Chamber emphasized the SEC's failure to state why it needed more time to correct the defects or how much more time it needed. Lastly, the Chamber declared that vacatur would not only leave the existing buyback disclosure rule in place but allow the Commission craft a new stock buyback rule with much better spelled out disclosure requirements (*Chamber of Commerce v. SEC*, December 7, 2023).

Lead up to Chamber's vacatur motion. The events leading up to the Chamber's motion to vacate the new rule were as follows:

1. The rule 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.
2. On October 31, 2023, in response to a challenge brought by the Chamber, the Fifth Circuit found that the final rule was arbitrary and capricious. The panel said the Commission failed to respond to petitioners' comments and must 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 for 30 days (i.e., until November 30, 2023) for the SEC to fix the identified deficiencies.
3. On November 22, 2023, the Commission announced 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.
4. The Chamber of Commerce opposed the motion, and the panel issued an order denying the extension on November 26.
5. On December 1, 2023, the SEC wrote to inform the court that it was not able to correct the defects in the rule within 30 days and needed an indefinite extension, which the court denied.

Chamber's reasons for vacatur. The Chamber first referenced the court's three reasons for holding, on October 31, 2023, that the Rule violated the Administrative Procedures Act (APA): (a) the Commission did not respond to the Chamber's comments on how to quantify the rule's economic effects; (b) the Commission did not substantiate the rule's primary benefit for reducing investor uncertainty about improperly motivated buybacks; and (c) the Commission did not substantiate the rule's secondary benefit for promoting price discovery. Hence, the first brick upon which the Chamber's argument for vacatur is based was that the three abovementioned APA violations are major flaws with the rule that absolutely mandate correction before: (i) the Chamber and issuers can comply with it; and (ii) investors can clearly understand its primary benefits for them.

Because of these major defects, the court gave the SEC 30 days to correct them but then the Commission not only failed to fix the defects in that allotted time period, but asked for an indefinite extension without stating how far along it was with the corrections and then, when the court rejected the extension, the SEC declared it would not be able to correct the defects in the foreseeable future.

The Chamber then pointed out that even if the court's October 31 opinion was not dispositive, it already denied the extended remand period on November 26, and that decision independently compels vacatur. To support this argument, the Chamber recited "the law-of-the-case doctrine" which holds that when a court decides upon a rule of law, that decision should continue to govern the same issue in subsequent stages of the same case and, moreover, the issue "need not have been explicitly decided; the doctrine also applies to those issues decided by necessary implication." So, by implication under the doctrine, vacatur here has been decided.

In conclusion, the Chamber contended "there is no compelling basis for leaving the Chamber and issuers wondering whether or when the SEC will force them to comply with a rule this court has held to be unlawful multiple times over. Instead, the court should put this case to rest and issue a final judgment vacating the rule."

The case is No. 23-60255.

Attorneys: Noel J. Francisco (Jones Day) for Chamber of Commerce of the United States of America. Ezekiel Levenson Hill for the SEC.

Companies: Chamber of Commerce of the United States of America

MainStory: TopStory CorporateGovernance ESGNews FormsFilings GCNNews InvestorEducation PublicCompanyReportingDisclosure LouisianaNews MississippiNews TexasNews