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The SEC's New Corporate Buy-Back Rules Have Been Formally Vacated By the U.S. 5th Circuit Court of Appeals:
Issuers May Suspend Plans to Comply But Should Consider Providing Some Additional Voluntary Disclosures on the Subject

Regulatory & Compliance on **December 20, 2023**

On December 19, 2023, the Fifth Circuit formally vacated the SEC's buy-back disclosure rules. While it is unclear what, if any, action the SEC may take in response to this definitive ruling, the realistic options appear to be commencing a new process to propose and adopt new rules, or to abandon the rule-making project for the time-being. Before proposing new rules, the SEC would have to develop the empirical evidence justifying them that the court determined that the SEC lacked. Either way, we expect that the SEC staff will seek to press issuers through interpretive guidance and the filing review process to provide more disclosure about their buy-back programs. The Enforcement Division will likely also continue to be on the lookout for potential new cases involving buy-back programs. We do not believe that the SEC will seek permission to appeal to the U.S. Supreme Court.

Issuers will no longer have to comply with the now-vacated rules, which would have imposed significant new monitoring and disclosure requirements. Calendar year companies would have had to begin to comply for their annual reports on Form 10 K (or 20 F for foreign private issuers) filed in 2024 and covering buy back activity in the fourth quarter of 2023. The vacated rules would have required narrative disclosure describing the issuer's rationales and objectives for engaging in the buy back program, as well as any policies or restrictions it placed on trading by officers and directors during the period in which the company is repurchasing shares. Quarterly, issuers would have had to file an exhibit including tabular disclosure of daily quantitative share repurchase information, including the average price and number of shares repurchased each day, as well as disclosure of repurchases made pursuant to Rule 10b5-1 and 10b-18 (the limited safe harbor from market manipulation concerns). Foreign private issuers would have been required to provide the disclosure in their annual reports on Form 20 F and on new Form F SR.

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