

**MEMO# 35564**

December 21, 2023

# Court Vacates Enhanced Share Repurchase Disclosure Requirements

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TO: ICI Members SUBJECTS: Closed-End Funds  
Compliance

Disclosure RE: Court Vacates Enhanced Share Repurchase Disclosure Requirements

Earlier this week, the U.S. Court of Appeals for the Fifth Circuit struck down Securities and Exchange Commission amendments that would have required enhanced disclosure when an issuer repurchases its own equity securities ("Share Repurchase Rule").<sup>[1]</sup> The ruling followed the Court's October 31 decision holding that the SEC acted arbitrarily and capriciously when it failed to respond to petitioners' comments and failed to conduct a proper cost-benefit analysis. The Court gave the SEC 30 days to correct the rule's defects.<sup>[2]</sup> On November 30, the SEC filed a letter stating that "the Commission was not able to 'correct the defects in the rule' within 30 days of the Court's opinion."<sup>[3]</sup> With no additional information, the Court determined that the Share Repurchase Rule "remains no less flawed—and no less unlawful—than it was on October 31." It thus vacated the rule.<sup>[4]</sup>

As a result, the Court rescinded the Share Repurchase Rule and issuers, including listed closed-end funds and BDCs, will no longer need to comply with any of its requirements.

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## Notes

<sup>[1]</sup> See Chamber of Com. of the USA v. SEC, No. 23-60255 (5th Cir.) (Dec. 19, 2023) ("December Order"), available at <https://www.ca5.uscourts.gov/opinions/pub/23/23-60255-CV1.pdf>. The Share Repurchase Rule would have required an issuer, including exchange-traded closed-end funds registered under the Investment Company Act of 1940 ("listed closed-end funds") and business development companies, to:

- file daily repurchase data either semi-annually (for listed closed-end funds) or quarterly (for BDCs);
- check a box indicating whether certain directors or officers traded in shares of the equity securities shortly before or after the public announcement of the repurchase plan or program;
- provide additional detail regarding the structure of its repurchase program and its share repurchases; and
- for operating company issuers and BDCs, add new quarterly disclosure in certain periodic reports related to an issuer's adoption and termination of certain trading arrangements.

See Share Repurchase Disclosure Modernization, Securities Exchange Act Rel. No. 97424 (May 3, 2023), available at <https://www.sec.gov/rules/proposed/2021/34-93783.pdf>. For a summary of the Share Repurchase Rule, see ICI Memorandum No. 35286 (May 8, 2023), available at <https://www.ici.org/memo35286>.

[2] See Chamber of Com. of the USA v. SEC, No. 23-60255 (5th Cir.) (Oct. 31, 2023), available at <https://www.ca5.uscourts.gov/opinions/pub/23/23-60255-CV0.pdf>.

[3] See December Order at 2.

[4] Id. at 4.

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