

Wiley Files *Amicus* Brief Supporting Challenge to SEC Share-Repurchase Rule

July 24, 2023

Washington, DC – On July 17, Wiley Rein LLP filed an *amicus* brief in the Fifth Circuit on behalf of S.P. Kothari and James Overdahl, both former U.S. Securities and Exchange Commission (SEC) Chief Economists, in support of the petitioners in *Chamber of Commerce of the United States of America, et al. v. U.S. Securities and Exchange Commission*, No. 23-60255.

The brief urges the Fifth Circuit to nullify the SEC’s new share-repurchase rule, arguing that the SEC has “failed to provide any credible support for these justifications” and has “relied on a selective review of the economic evidence.”

The two original economic justifications for the rule, “asymmetric information between insiders and external stakeholders and the potential for opportunistic use of share repurchases by management,” fail to “adequately consider economic evidence addressing the economic consequences of the rule,” according to the brief. Thus, the SEC has “severely underestimated both the Rule’s immediate costs and broader economic consequences.”

The rule “flips the burden” of the possibility of suboptimal share repurchases happening systematically from the SEC to the regulated public, and thus “disregards plentiful evidence in the economic literature that there is no systemic abuse of share repurchasing,” Wiley’s attorneys explained on behalf of Kothari and Overdahl. In addition, the rule “not only creates substantial compliance costs but also will likely harm investors – particularly retail investors – by creating needless noise in the set of information they must evaluate.” The *amicus* brief argues, in agreement with the petitioners, that the rule is “arbitrary and capricious because there are substantial costs

Related Professionals

Megan L. Brown
Partner

202.719.7579
mbrown@wiley.law

Thomas M. Johnson, Jr.
Partner

202.719.4550
tmjohnson@wiley.law

Kevin B. Muhlendorf
Partner

Michael J. Showalter
Special Counsel
202.719.7393
mshowalter@wiley.law

Practice Areas

Issues and Appeals
Litigation

and no discernable benefits.”

The brief was authored by Wiley partners Megan L. Brown, Thomas M. Johnson, Jr., Kevin B. Muhlendorf, and special counsel Michael J. Showalter.