

SEC PROPOSES AMENDMENTS TO ISSUER SHARE REPURCHASE SAFE HARBOR

The Securities and Exchange Commission (the “SEC”) has proposed amendments to Rule 10b-18 under the Securities Exchange Act of 1934 (the “Exchange Act”),¹ which provides a “safe harbor” from liability under certain anti-manipulation provisions of the Exchange Act² when issuers repurchase their common stock in the market in accordance with the Rule’s manner, timing, price, and volume conditions. The proposed amendments are intended to clarify and modernize the safe harbor provisions in light of the changes in the securities markets since Rule 10b-18’s adoption in 1982.

Proposed Amendments

The SEC’s proposed amendments include

- *Adding new restrictions to the timing condition concerning opening purchases.*

Under the current rule, purchases by an issuer of its common stock that are the opening (regular way) purchase reported in the consolidated system are excluded from the Rule 10b-18 safe harbor. An issuer’s purchase, however, may be the opening purchase in the principal market for its security and the opening purchase in the market in which the purchase is effected, *provided* that there is already an opening purchase reported in the consolidated system that day. The proposal would expand the exclusion to also preclude Rule 10b-18 purchases as the opening purchase in the principal market for the security **and** in the market where the purchase is effected.

- *Modifying the price condition to allow certain VWAP purchases*

The price condition of Rule 10b-18 limits an issuer bidding for or buying its securities to a purchase price that is no higher than the highest independent bid or last independent transaction price, whichever is higher, quoted or reported in the consolidated system at the time the purchase is effected.

The SEC proposes to relax this standard to allow certain VWAP (“volume weighted average price”) transactions. Recognizing there may be instances in which the execution price of an issuer’s VWAP purchase effected at the end of that trading day (after the security’s VWAP has been calculated and assigned to the transaction) would exceed the highest independent bid or last

¹ Purchases of certain Equity Securities by the Issuer and Officers, Securities Exchange Act Release No. 34-61414 (January 26, 2010) (<http://www.sec.gov/rules/proposed/2010/34-61414.pdf>).

² An issuer within the limits of Rule 10b-18 will not be deemed to have violated Sections 9(a)(2) and 10(b) of the Exchange Act and Rule 10b-5 under the Exchange Act, solely by reason of the timing, manner, volume or price of its repurchases.

independent transaction price quoted or reported in the consolidated system for that security and, therefore, outside of the safe harbor's current price condition, the SEC proposes to except from Rule 10b-18's price condition Rule 10b-18 purchases effected on a VWAP basis, provided that certain criteria are met. To qualify for the proposed exception

- the securities must be actively traded securities (as defined under Rule 101(c)(1) of Regulation M³);
- the purchase must be entered into or matched before the regular trading session opens;
- the execution price of the VWAP matched trade must be determined based on a full trading day's volume;
- the issuer's VWAP purchase must not exceed 10 percent of the Average Daily Trading Volume ("ADTV") in the security and must not be effected for the purpose of creating actual, or apparent, active trading in or otherwise affecting the price of any security;
- the VWAP assigned to the purchase must be calculated as set forth in the revised Rule and based on trades effected in accordance with the Rule's timing and price conditions;⁴ and
- the VWAP assigned to the purchase must not include trades effected at a price that exceeds the highest independent bid or the last independent transaction price, whichever is higher, quoted or reported in the consolidated system at the time such trade is effected.

In addition, the VWAP purchase must be reported using a special VWAP (e.g., a ".W") trade modifier, which is intended to prevent the purchase from influencing the pricing direction of the security by indicating to the market that such purchase is unrelated to the current or closing price of the security.

The SEC also seeks comment on whether to expand the proposed exception to the price condition in Rule 10b-18 to include issuer repurchases effected through certain electronic trading systems that match and execute trades at various times and at independently-derived prices, such as at the mid-point of the national best bid and offer ("NBBO").

³ Under Regulation M, issuers with a security that has an Average Daily Trading Volume ("ADTV") value of \$1 million or more and a public float value of \$150 million or more are excluded from the requirements of Rule 101 of Regulation M under its "actively traded securities" exception.

⁴ Therefore, the trades must not include those effected as the opening purchase reported in the consolidated system (including the opening purchase in the principal market for the security and in the market in which the purchase is effected) or during the last ten minutes before the scheduled close of the primary trading session in the principal market for the security, and in the market where the purchase is effected.

- *Limiting the Price Condition Disqualification Due to Flickering Quotes*

The Rule provides that failure to meet any one of the four conditions with respect to any of the issuer's repurchases during the day will disqualify *all* of the issuer's Rule 10b-18 purchases from the safe harbor for that day (the "disqualification provision"). The SEC proposes to limit the Rule's disqualification provision in instances where an issuer's repurchase order is entered in accordance with the Rule's four conditions but, immediately thereafter, is executed outside of the price condition solely due to rapid and repeated changes in the current national best bid during the period between the identification of the current national best bid and the execution or display of the Rule 10b-18 bid or purchase ("flickering quotes"). Recognizing that the increased speed of today's markets, as evidenced by flickering quotes, has made it increasingly difficult for an issuer to ensure that every purchase of its common stock during the day will meet the Rule's current price condition, the SEC proposes to disqualify from reliance on the Rule 10b-18 safe harbor only the non compliant purchase, rather than all of the issuer's other qualifying Rule 10b-18 purchases for that day, if an issuer's repurchase fails to meet the price condition due to flickering quotes.

- *Expanding the Rule's Merger Exclusion with Respect to SPACs*

The proposed amendments would also modify the "merger exclusion" provision, which provides that the safe harbor is not available for an issuer from the time of a public announcement of a merger, acquisition or similar transaction until the earlier of such transaction or the vote of the target shareholders. The SEC proposes to extend the time in which the safe harbor is unavailable in connection with an acquisition by a special purpose acquisition company ("SPAC") until the completion of the transaction or the completion of the vote by both the target shareholders and the SPAC shareholders.

- *Revising the Definition of "Block" in the Volume Condition*

Under the current volume condition, an issuer may effect daily purchases in an amount up to 25 percent of the ADTV in its shares, or alternatively, may once each week purchase one block of its common stock in *lieu* of purchasing under the 25 percent volume limitation for that day (the "one block per week" exception). The SEC proposes to amend the definition of "block" to reference "ADTV" instead of "trading volume" to make the definition consistent with the current Rule.⁵

The SEC is accepting comments on its proposals through March 1, 2010.

⁵ Rule 10b-18(a)(5) currently defines a "block" as a quantity of stock that: (i) has a purchase price of \$200,000 or more; (ii) is at least 5,000 shares and has a purchase price of at least \$50,000; or (iii) is at least 20 round lots of the security and totals 150 percent or more of the trading volume for that security or, in the event that trading volume data are unavailable, is at least 20 round lots of the security and totals at least one-tenth of one percent (.001) of the outstanding shares of the security, exclusive of any shares owned by any affiliate.

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