

**SEC AMENDS SAFE HARBOR FOR ISSUER STOCK REPURCHASES AND ADOPTS
DISCLOSURE REQUIREMENTS FOR ISSUER STOCK REPURCHASES**

On November 10, 2003, the Securities and Exchange Commission (the “SEC”) adopted amendments to Rule 10b-18 under the Securities Exchange Act of 1934 (“Rule 10b-18” or the “Rule”),¹ which establishes a safe harbor from market manipulation liability under the federal securities laws for purchases by an issuer of its own common stock. The amendments, which are discussed in more detail below, make the following significant changes to the Rule:

- Subject to certain volume limitations, issuers can rely on the safe harbor for purchases effected during the period between the public announcement of a merger until the earlier of the closing of the merger and the vote of the target’s shareholders.
- Issuers that meet an average daily trading volume (“ADTV”)² and public float test are permitted to stay in the market until 10 minutes before the close of trading (the Rule previously required all issuers to observe to refrain from making offers or repurchases for 30 minutes before the close).
- Whereas issuers up to now have been able to exclude purchases of “blocks” of securities from the volume limitation in the rule, block repurchases will now have to be counted toward the 25% average daily trading volume limitation, and alternatively, issuers will now be permitted to purchase one block per week regardless of volume restrictions. There now is a special provision for market-wide trading suspensions that will allow issuers, during the trading session immediately following the reopening of the market, to purchase 100% of the average daily trading volume.

¹ SEC Release Nos. 33-8335; 34-48766 (November 10, 2003). Available at <http://www.sec.gov/rules/final/33-8335.htm> (the “Release”).

² The final rules define “ADTV” as the average daily trading volume reported during the four calendar weeks preceding the week in which the repurchase is to be effected.

The SEC also approved new rules that require disclosure on a periodic basis of all open market and private repurchases of equity securities by an issuer, regardless of whether such repurchases are effected pursuant to Rule 10b-18. The disclosure rules go into effect December 17, 2003, with the exception of the disclosure rules under the Investment Company Act of 1940, which go into effect July 15, 2004.

Amendments to Rule 10b-18

The Rule 10b-18 safe harbor was designed to minimize the impact of an issuer's repurchases and to establish a security's price based on independent market forces. By complying with the conditions of the Rule, an issuer will not be deemed to have violated the anti-manipulation provisions of the federal securities laws³ solely by reason of the manner, timing, price or volume of bids or purchases made. To satisfy the Rule's safe-harbor provisions, an issuer must satisfy the Rule's manner, timing, price and volume conditions on a daily basis. Failure to meet any one of the four conditions will disqualify the issuer's purchases from the safe harbor for that day. Rule 10b-18 is not intended to apply in contexts where the Commission believes the issuer has a heightened incentive to manipulate the market price of its securities. Accordingly, the safe harbor excludes issuer bids and purchases made during certain corporate events, for example, during mergers, tender offers and distributions that involve the issuer.

Clarification of Scope of Rule 10b-18

The SEC has amended the definition of a "Rule 10b-18 purchase" to clarify that the current exclusion from the safe harbor for purchases effected "pursuant to a merger, acquisition, or similar transaction involving a recapitalization" (the "merger exclusion") applies to purchases effected during the period from the time of the public announcement of the transaction until the earlier of (i) the day the acquisition closes and (ii) the day the target's stockholders vote on the acquisition. Accordingly, purchases made during that period will not qualify for the safe harbor

³ The Commission stated in the Release that some repurchase activity that meets the safe harbor conditions may violate the anti-fraud and anti-manipulation provisions of the Exchange Act if the issuer possesses favorable, material non-public information concerning its securities. The Commission added that the safe harbor is not available "if the repurchases are fraudulent or manipulative, when viewed in the totality of the facts and circumstances surrounding the repurchases (i.e., facts and circumstances in addition to the volume, price, time, and manner of the repurchases)." Release at n. 3. At the same time, the Commission stated:

Rule 10b-18 is not the exclusive means of making non-manipulative issuer repurchases. As the Rule states, there is no presumption that bids or purchases outside of the safe harbor violated Sections 9(a) (2) or 10(b) of the Exchange Act, or Rule 10b-5 under the Exchange Act. Given the widely varying characteristics in the market for the stock of different issuers, it is possible for issuer repurchases to be made outside of the safe harbor conditions and not be manipulative.

See text accompanying n. 6 in Release.

unless either (A) the merger consideration is solely cash and there is no valuation period or (B) the total volume of issuer repurchases does not exceed the lesser of (i) 25% of the security's ADTV or (ii) the issuer's average daily Rule 10b-18 purchases during the three calendar months preceding the date of the announcement of such transaction (or in the case of block purchases,⁴ the size and frequency of block purchases during the same three month period). The issuer must still comply, however, with any applicable restrictions under Regulation M, which governs bids and purchases during an offering, including an offering pursuant to a merger.

Manner of Purchase Condition

Under Rule 10b-18, an issuer must not use more than one broker or dealer on any single day to bid for or purchase shares of its common stock, but may purchase from any number of brokers or dealers in transactions the issuer has not solicited. The amendments also clarify that if the broker-dealer selected by the issuer is an electronic communications network ("ECN") or an alternative trading system ("ATS"), the issuer must not use any other broker-dealer during regular trading hours on the same day.

Timing Condition

Under the previous version of Rule 10b-18, an issuer could not effect a purchase that would constitute the opening transaction, nor could it effect a purchase during the last half hour prior to the scheduled close of trading.

The amendments to Rule 10b-18 still prohibit issuers from making purchases at the opening of trading, but they allow issuers with an ADTV value of \$1 million or more and a public float value of \$150 million or more to repurchase shares up until the ten minutes before the scheduled close of trading. Companies that do not meet the ADTV or public float tests must refrain from offering for or purchasing their stock during the 30 minutes before the scheduled close of trading.

Price Condition

Under the previous version of Rule 10b-18, the price limitation varied depending upon the type of market in which the security was traded, but in general, the price could not have been higher than the highest current independent bid quotation or the last independent sales price.

The amendments eliminate price distinctions between types of securities and apply a uniform price condition that limits issuer repurchases to a purchase price that does not exceed the higher

⁴ The Rule defines a "block" as a quantity of stock that (1) has a purchase price of \$200,000 or more, (2) is at least 5,000 shares and has a purchase price of at least \$50,000, or (3) is at least 20 round lots of the security and totals 150% or more of the ADTV of that security.

of the highest independent bid or the last independent transaction price, quoted or reported in the consolidated system.⁵

Volume Condition

Before the current amendments, Rule 10b-18 permitted issuers to make daily purchases in an amount up to 25% of the ADTV in their shares each day but excluded purchases of blocks from the volume calculation. Any block purchases by the issuer, however, were not included in the ADTV calculation used to determine the permitted volume of the issuer's non-block purchasing.

The amendments eliminate the special treatment of block purchases and thus require issuers to include block purchases in applying the Rule's 25% volume limitation. Under the amendments, however, issuers are also entitled to include block purchases in calculating the ADTV for their securities, thus increasing the amount of stock an issuer may purchase within the safe harbor. Alternatively, the amendments allow issuers to make one block repurchase per week without being subject to the 25% volume limitation. Such a block would not be included in the calculation of ADTV.

New Mandatory Disclosure Requirements

To increase the transparency of issuer repurchases, the SEC has added Item 703 to Regulation S-K, Item 2(e) to Forms 10-Q and 10-QSB, Item 5(c) to Forms 10-K and 10-KSB, and Item 8 to Form N-CSR, which requires issuers to disclose in their periodic reports all open market and private repurchases of equity securities, regardless of whether the purchases were effected pursuant to Rule 10b-18.⁶ Specifically, the new rules require issuers to disclose the following information in tabular form on a monthly basis for the period covered by the report:

- total number of shares (or units) purchased;
- the average price paid per share;
- the number of shares purchased pursuant to a publicly announced repurchase plan or program; and

⁵ The amendments define a "consolidated system" as "a consolidated transaction (or quotation) reporting system that collects and publicly disseminates on a current and continuous basis transaction (or quotation) information in equity securities pursuant to an effective transaction reporting plan, the rules of a national securities exchange, or the rules of a national securities association." Trades effected in securities listed on the New York or American Stock Exchanges or traded on The Nasdaq Stock Market are reported on the consolidated system.

⁶ Given that Form N-CSR is a semi-annual report, closed-end management investment companies are only required to disclose issuer repurchases on a semi-annual basis. See text accompanying n. 114 in Release.

- the maximum number of shares (or approximate dollar value) that may still be purchased pursuant to such plan or program.

In addition, the new rules require footnote disclosure of the principal terms of publicly announced repurchase plans, including:

- the date of announcement;
- the share or dollar amount approved;
- the expiration date (if any) of the plans or programs;
- each plan or program that has expired during the period covered by the table; and
- each plan or program that the issuer has determined to terminate prior to expiration or under which the issuer does not intend to make further purchases.

Compliance Dates

The amendments to Rule 10b-18 become effective December 17, 2003. The new tabular disclosure in Forms 10-Q, 10-QSB, 10-K and 10-KSB is required to be in an issuer's first quarterly or annual report filed for a period ending after March 15, 2004. The new tabular disclosure in Form N-CSR is for periods ending on or after June 15, 2004.

If you have any questions regarding the SEC Safe Harbor amendment, please contact Roger Blanc at 212-728-8206 (email: rblanc@willkie.com) or Daniel Schloendorn at 212-728-8265 (email: dschloendorn@willkie.com) of the Investment Management Group.

Willkie Farr & Gallagher LLP is headquartered at 787 Seventh Avenue, New York, New York 10019-6099. Our telephone number is 212-728-8000 and our facsimile number is 212-728-8111. Our website is located at www.willkie.com.

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