



## SEC Proposes Amendments to Rule 10b-18 Safe Harbor for Issuer Share Repurchases

January 29, 2010

On January 26, 2010, the Securities and Exchange Commission (“SEC”) proposed amendments to Rule 10b-18 under the Securities Exchange Act of 1934.<sup>1</sup> The SEC is soliciting comments on the proposed amendments through March 1, 2010.

Rule 10b-18 provides a non-exclusive safe harbor from liability under the anti-manipulation provisions of the Exchange Act, including Rule 10b-5, when an issuer<sup>2</sup> repurchases shares of its common stock in conformity with the conditions of the Rule regarding the manner, price, volume and timing of such purchases. The conditions to Rule 10b-18 are designed to minimize the impact of issuer repurchases on the market, thereby allowing a security’s price to be established based on independent market forces without undue influence by the issuer.

The SEC’s proposed amendments to Rule 10b-18 are intended to clarify and modernize the Rule in light of recent market developments.

### PROPOSED AMENDMENTS TO RULE 10b-18

The proposed amendments to Rule 10b-18 include:

- *Tightening of the timing condition with respect to opening purchases* – The Rule 10b-18 safe harbor currently excludes from its scope opening regular way purchases reported in the consolidated system. The proposed amendments would also exclude the opening purchase(s) in both the principal market for the common stock and the market where the issuer repurchases are effected.
- *Relaxing the price condition as it relates to VWAP purchases* – The price condition of Rule 10b-18 requires that each repurchase be made at a price that is no higher than the higher of (x) the highest independent bid and (y) the last independent transaction price, quoted or reported in the consolidated system at the time that the purchase is effected. The SEC has proposed excepting from the Rule 10b-18 price condition purchases made at a volume-weighted average price (“VWAP”) if:

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<sup>1</sup> *Purchases of Certain Equity Securities by the Issuer and Others*, Release No. 34-61414, available at <http://sec.gov/rules/proposed/2010/34-61414.pdf>.

<sup>2</sup> The Rule 10b-18 safe harbor may also apply to purchases of an issuer’s common stock made by an affiliated purchaser. In the memorandum, references to “issuers” includes their affiliated purchasers.

- the securities purchased are “actively-traded securities;”<sup>3</sup>
  - the VWAP purchase is entered into or matched before the regular trading session opens;
  - the VWAP purchase price is determined based on a full trading day’s volume, following a calculation procedure that uses only prices from regular way trades effected in accordance with Rule 10b-18 timing and price conditions that are reported in the consolidated system during the primary trading session for the security;
  - the VWAP purchase does not exceed 10% of the average daily trading volume (“ADTV”) in the security;
  - the VWAP purchase is not effected for the purpose of creating actual, or apparent, active trading in or otherwise affecting the price of any security; and
  - the VWAP purchase is reported using a special VWAP trade modifier (“.W”).
- *Relaxing the price condition as it relates to disqualifications due to flickering quotes* - Under Rule 10b-18 as currently formulated, any purchase that violates the pricing condition would disqualify all purchases by the issuer on the same day.

The SEC has proposed that, to the extent that non-compliance with the pricing condition is attributable to flickering quotes (*i.e.* rapidly changing quotes that may change multiple times in a single second, making it difficult for the purchaser to comply with the pricing condition), such violation would not disqualify other purchases made by the issuer on the same day with respect to which all the conditions of the safe harbor were met.

- *Other potential exceptions for alternative passive pricing systems* - The SEC has also solicited comments with respect to other possible exceptions to the pricing condition for purchases effected using other alternative passive pricing systems, such as the mid-point of the national best bid and offer or “mid-peg” orders.
- *Expansion of the merger exclusion with respect to SPACs* - Rule 10b-18 currently limits the availability of its safe harbor during the period from the public announcement of a merger, acquisition or similar transaction involving a recapitalization to the earlier of (i) the completion of such transaction and (ii) the vote by target shareholders on such transaction (the “merger exclusion”).

The SEC has proposed expanding the merger exclusion in connection with an acquisition by a special purpose acquisition company (“SPAC”) by extending the time period during which the safe harbor is unavailable until the earlier of (x) the completion of the acquisition and (y) the completion of the vote for the transaction by shareholders in both the SPAC and the target company.

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<sup>3</sup> As proposed, “actively-traded security” would have the same meanings as under Regulation M, which provides that “actively-traded securities” have an ADTV of \$1 million or more and a public float value of \$150 million or more.

## ADDITIONAL REQUESTS FOR COMMENTS

In addition to soliciting comments on the proposed amendments described above, the SEC has solicited comments on a number of other questions regarding the scope of the Rule 10b-18 safe harbor, including:

- *Availability of Safe Harbor to Less Liquid Securities* – Should the safe harbor continue to apply in the same manner to less liquid, less transparent securities, such as OTCBB and Pink Sheet securities?
- *Concurrent Insider Transactions* – Should the safe harbor be available at a time when the issuer’s insiders are selling shares of the issuer’s stock?
- *Availability of Safe Harbor to Different Types of Securities and Transactions* – Should the safe harbor be available to
  - securities other than common equity, such as preferred stock, warrants, rights, convertible debt securities or other products?
  - repurchases involving the use of futures or options contracts?<sup>4</sup>
  - Common stock share repurchases effected outside of the United States?
- *Potential Concerns Raised by Non-traditional Methods* – What manipulative concerns, if any, are raised by alternative or novel methods of repurchasing securities, such as accelerated share repurchase programs, use of derivatives or share accumulation programs? Are there limitations that should be introduced to address these concerns?
- *Disclosure Considerations* - Should the safe harbor *only* be available to issuers
  - who have made available current financial disclosures?
  - who comply with U.S. disclosure requirements regarding issuer stock repurchases?
  - who disclose repurchases on a daily basis or even a real time basis? and/or
  - who maintain (and provide the SEC, upon request) separately retrievable written records concerning the trade details?

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<sup>4</sup> It is not clear whether other types of derivatives were intentionally omitted from this question in the release. In the same paragraph the SEC asked (a) “should the number of shares underlying the option or security futures contract (or other derivative security) entered into by an issuer count against an issuer’s 25% daily volume limitation...” (emphasis added) and (b) what effect, if any, should taking delivery of common stock pursuant to such transaction have on Rule 10b-18’s other conditions? Additionally, the SEC’s questions regarding purchases by non-traditional methods suggest that the SEC may be considering expanding the availability of Rule 10b-18’s safe harbor to issuer share repurchases made pursuant to, and brokers’ covering transactions in connection with, accelerated share repurchase programs, forward share repurchase contracts and other derivatives.

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## UNITED STATES

### **New York**

425 Lexington Avenue  
New York, NY 10017  
+1-212-455-2000

### **Los Angeles**

1999 Avenue of the Stars  
Los Angeles, CA 90067  
+1-310-407-7500

### **Palo Alto**

2550 Hanover Street  
Palo Alto, CA 94304  
+1-650-251-5000

### **Washington, D.C.**

1155 F Street, N.W.  
Washington, D.C. 20004  
+1-202-636-5500

## EUROPE

### **London**

CityPoint  
One Ropemaker Street  
London EC2Y 9HU  
England  
+44-(0)20-7275-6500

## ASIA

### **Beijing**

3119 China World Tower One  
1 Jianguomenwai Avenue  
Beijing 100004  
China  
+86-10-5965-2999

### **Hong Kong**

ICBC Tower  
3 Garden Road, Central  
Hong Kong  
+852-2514-7600

### **Tokyo**

Ark Mori Building  
12-32, Akasaka 1-Chome  
Minato-Ku, Tokyo 107-6037  
Japan  
+81-3-5562-6200

## LATIN AMERICA

### **São Paulo**

Av. Presidente Juscelino Kubitschek, 1455  
São Paulo, SP 04543-011  
Brazil  
+55-11-3546-1000