SEC Proposes Amendments to Rule 10b-18 Stock Repurchase "Safe Harbor"

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The Securities and Exchange Commission has proposed amendments to the timing, price and volume conditions of Rule 10b-18, the Exchange Act rule that governs public companies' repurchases of their common stock. The proposed changes provide companies with more flexibility in their stock buybacks, especially in times of extreme market disturbance.

The SEC has also proposed amendments to Exchange Act Regulations S-K and S-B and Forms 10-Q and 10-K to require quarterly disclosure of all issuer repurchases (open market and private transactions), regardless of whether the transactions are effected pursuant to Rule 10b-18.

The SEC is accepting comments to these proposed amendments through February 18, 2003.

Proposed Amendments to Rule 10b-18's "Safe Harbor"

The amended Rule 10b-18 would continue to provide companies with a "safe harbor" from charges of manipulating their stock price when repurchasing shares in the open market. To come within the safe harbor for any given day, an issuer must satisfy the manner, timing, price and volume conditions when purchasing its own common stock. If an issuer fails to meet any one of the four conditions, the issuer's purchases are disqualified from the safe harbor for that day. The SEC's proposed amendments would alter the timing, price and volume conditions.

Timing Condition

The current Rule 10b-18 prohibits companies from making stock repurchases during the last half-hour of trading. The proposed modifications would allow issuers of securities that are considered less susceptible to manipulation to stay in the market until 10 minutes before the market closes. Securities that qualify for such treatment are those with an average daily trading volume (newly defined as ADTV) of $1 million or more for the previous four weeks and a public float value (aggregate market value of common stock held by non-affiliates of the issuer) of $150 million or more. Issuers of all other eligible securities still may not make repurchases during the last half-hour of trading. The SEC has proposed no changes to the provisions of the current Rule 10b-18 that prohibit issuers from making the opening transaction for any given day.

Price Condition

The SEC has proposed a uniform price condition regardless of where the securities are traded. Price limitations under the existing Rule 10b-18 vary depending on the market for the security. Under the proposed amendments to Rule 10b-18, issuers may repurchase their securities at a purchase price that does not exceed the highest independent bid or the last independent transaction price, whichever is higher, reported in the consolidated system.

Volume Condition

The SEC's proposal modifies the treatment of "block purchases." The current Rule 10b-18 limits an issuer's daily purchases to a maximum of 25% of the ADTV of its shares. Block purchases are not subject to this volume limitation, nor are the shares purchased in block trades included in calculating the ADTV. The SEC plans to keep intact the current definition of "block": a quantity of stock that

- has a purchase price of $200,000 or more;
- is at least 5,000 shares and has a purchase price of at least $50,000;
- is at least 2,000 shares and totals 150% or more of the ADTV for that security; or
- is at least 2,000 shares and totals at least 0.1% of the outstanding shares of the security, exclusive of any shares owned by any affiliate.

For the first time, however, issuers would have to include block purchases in applying the 25% volume limitation under the amended Rule 10b-18. Issuers would also be able to include their block purchases in calculating the ADTV for the security, thereby increasing the amount of stock that some issuers may purchase within the safe harbor.

As an alternative to the 25% volume limitation, the proposed amendments would allow issuers to purchase up to a daily aggregate of 500 shares, instead of the current 100 shares.
**Manner Condition**

The SEC has not proposed changes to the “manner” condition. Issuers would still be required to use a single broker or dealer on a given day to bid for or purchase their common stock.

**Market Suspension**

The proposed amendments would also modify the alternative conditions of the safe harbor applicable in the trading session following a market-wide trading suspension. The current 25% volume limitation would increase to 100% of the ADTV for that security during such a trading session. The SEC has not proposed changes to the alternative timing condition that includes in the safe harbor purchases made at the reopening and during the last half-hour prior to the scheduled close of trading or at the next day's opening if a market-wide trading suspension was in effect at the scheduled close of trading.

**New Disclosure Provision Regarding Issuer Repurchases**

The SEC has also proposed requiring periodic disclosure of all issuer repurchases of equity securities, regardless of whether the transactions are within the Rule 10b-18 safe harbor. Companies would also be required to report changes to any previously announced repurchase programs.

Under the proposal, this disclosure would be required under a new Item 703 of Regulations S-K and S-B. An issuer would have to disclose all of its repurchases in each quarter, including both open market and private transactions, in a new table in its Forms 10-Q and 10-K:

**ISSUER PURCHASES OF EQUITY SECURITIES**

<table>
<thead>
<tr>
<th>Period</th>
<th>(a) Total Number of Shares (or Units) Purchased</th>
<th>(b) Average Price per Share (or Unit)</th>
<th>(c) Identity of Broker-dealer(s) Used to Effect Purchases</th>
<th>(d) Number of Shares (or Units) Purchased as Part of Publicly Announced Plans or Programs</th>
<th>(e) Maximum Number (or Approximate Dollar Value) of Shares (or Units) that May Yet Be Purchased Under the Plans or Programs</th>
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<tbody>
<tr>
<td>Month #1</td>
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<td>Month #2</td>
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In addition, an issuer would have to disclose in footnotes to the table the principal terms of publicly announced repurchase plans or programs, 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 quarter covered by the table;
- each plan or program the issuer has determined to terminate prior to expiration; and
- each plan or program under which the issuer has not purchased during the quarter covered by the table and whether the issuer still intends to purchase under that plan or program.

The footnotes would also briefly disclose the nature of any transactions made other than pursuant to a publicly announced repurchase plan or program. These transactions would include open market and privately negotiated purchases, issuer tender offers, purchases made by the issuer upon another person's exercise of outstanding put rights, and other transactions through which the issuer purchases its equity securities.

The SEC is seeking comments on whether it should require more frequent disclosure of issuer repurchase activity (e.g., on a monthly basis or within 10 days of the transaction).

**Text of the Proposed Rules**
This Update is intended to be only a summary of the SEC's proposed rules. You can find the full text of the proposed rules at http://www.sec.gov/rules/proposed/33-8160.htm. You can find further discussion of other recent laws, regulations and rule proposals of interest to public companies on our website.

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