

Client Alert

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

A. Introduction

On December 10, 2002, the SEC proposed amendments to Rule 10b-18 under the Securities Exchange Act of 1934 (the “Exchange Act”),¹ which currently provides a safe harbor from liability under antimanipulation provisions of the Exchange Act for issuer share repurchases that satisfy specific manner, timing, price and volume conditions. The proposed amendments, which are intended to simplify and update the safe harbor provisions to reflect market developments since their adoption, would change these qualifying conditions by, among other things:

- eliminating the block exception to the 25% volume limitation on repurchases, and requiring issuers to include block purchases in the calculation of average daily trading volume (“ADTV”);
- increasing the volume limitation to 100% of ADTV in trading sessions immediately following market-wide trading suspensions;
- relaxing the timing condition by allowing issuers to stay in the market longer for actively traded securities; and
- applying a more uniform price condition.

The proposed amendments would also require increased disclosure of issuer share repurchases in periodic SEC reports.

The SEC has requested that any comments on the proposed rules be submitted by February 18, 2003.

B. Volume Condition Amendments

Under existing Rule 10b-18, an issuer must limit daily share repurchases to 25% of the ADTV of the applicable security in order to qualify for safe harbor treatment. ADTV is defined as the average daily trading volume of the applicable security during the four

¹ Securities and Exchange Commission Release Nos. 33-8160; 34-46980; IC-25845; File No. S7-50-02. A copy of the Release is available on the SEC website at <http://www.sec.gov/rules/proposed/33-8160.htm>

calendar weeks preceding the week in which the Rule 10b-18 purchase is to be effected. Block purchases² are not currently included in the calculation of an issuer's ADTV, nor are block purchases subject to the 25% volume limitation. The SEC is proposing to eliminate this special treatment of block purchases on the basis that market conditions, including the increased frequency of block purchases, no longer justify the exception. Thus, under the proposed rules block purchases would be subject to the 25% volume limitation. Issuers would, however, be able to include block purchases when calculating the ADTV of a security.

The proposed amendments would also modify the volume limitation in two other respects. First, issuers would be permitted to purchase an aggregate daily amount of 500 shares as an alternative to the 25% volume limitation, thereby increasing the amount of shares that issuers of securities with a low ADTV might otherwise be able to repurchase under the safe harbor. Second, the 25% volume limitation would be increased to 100% of ADTV in trading sessions immediately following market-wide trading suspensions.

C. Timing Condition Amendments

Under the existing rules, in order to qualify for the safe harbor an issuer's purchase must not constitute the opening transaction in the security in the consolidated system and an issuer may not purchase shares during the last 30 minutes before the scheduled close of trading. The proposed amendments would continue to limit issuers from effecting opening market transactions, but would ease the restrictions on purchases near the close of trading for more liquid securities. Under the proposed amendments, repurchases of issuer securities having an ADTV value of \$1 million or more and a public float of \$150 million or more would not be permitted during any of the following periods:

- the 10 minutes before the scheduled close of the primary (regular) trading session in the principal market for the security;
- the 10 minutes before the scheduled close of the primary (regular) trading session in the market where the purchase is made; or
- after the termination of the period in which last sale prices are reported in the consolidated system.

² A block generally is defined under current Rule 10b-18 to include a quantity of stock that either: (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 (2,000 shares) and totals 150 percent or more of the ADTV for that security.

For all other eligible securities, the existing restriction on repurchases during the 30 minutes before the scheduled close of trading would continue.

D. Price Condition Amendments

The price limitation under current Rule 10b-18 varies depending on the applicable market for the security (*i.e.*, whether the security is a “reported security”,³ an exchange-traded security, or a NASDAQ security). The proposed amendments would impose a uniform purchase price condition that limits an issuer from purchasing shares at a price exceeding the highest independent bid or the last independent transaction price, whichever is higher, that is quoted or reported in a consolidated system. For securities that are not quoted or reported in a consolidated system, the uniform price limit would be the highest independent bid or the last transaction price, whichever is higher, displayed and disseminated on any national securities exchange or on any inter-dealer quotation system that displays at least two priced quotations for the security. For all other securities, purchases must be effected at a price no higher than the highest independent bid obtained from three dealers.

E. Increased Disclosure of Share Repurchases

The proposed amendments would also require the periodic disclosure of issuer repurchases of shares of any class of equity securities registered under Section 12 of the Exchange Act. Regulations S-K and S-B, Forms 10-Q, 10-K and 20-F, and proposed Form N-CSR, would be amended to require disclosure, in a new table, of the following:

- all issuer repurchases of its Section 12 registered equity securities (both open market and private transactions) for the applicable period (on a month-by-month basis);
- the average price paid per share;
- the identity of any broker-dealer used to effect the purchases (not required by Form 20-F);
- the number of shares purchased as part of publicly announced repurchase plans or programs for the applicable period; and
- the maximum number (or approximate dollar value) of shares that may yet be purchased under such plans or programs.

³ “Reported security” is defined under existing rules as any security as to which last sale information is reported in the consolidated transaction reporting system.

The proposed amendments also would require footnote disclosure of the principal terms of publicly announced repurchase plans or programs, as well as the amount and nature of repurchases made other than through publicly announced repurchase plans or programs.

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The SEC requests that comments on the proposed rules be received no later than February 18, 2003. Comments may be submitted electronically to rule-comments@sec.gov. All comment letters should refer to File No. S7-50-02 (in the subject line if sent electronically).

January 15, 2003

For Additional Information

This client alert can be found, together with other recent Chadbourne & Parke LLP client alerts, at http://www.chadbourne.com/publications/sub_Publications.html. If you have any questions regarding this proposal, please contact any of the following:

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