

II. Overview of Current Rule 10b-18

A. Rule 10b-18 as a "Safe Harbor"

In 1982, the Commission adopted Rule 10b-18,⁴ which provides that an issuer 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 manner, timing, price, or volume of its repurchases, if the issuer repurchases its common stock in the market in accordance with the safe harbor conditions.⁵ Rule 10b-18's safe harbor conditions are designed to minimize the market impact of the issuer's repurchases, thereby allowing the market to establish a security's price based on independent market forces without undue influence by the issuer.

Although the safe harbor conditions are intended to offer issuers guidance when repurchasing their securities in the open market, 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 violate Sections 9(a)(2) or 10(b) of the Exchange Act, or Rule 10b-5 under the Exchange Act.⁶ 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.

B. Scope of the Current Rule

Rule 10b-18 applies to bids for and purchases of an issuer's common stock by or for an issuer.⁷ Purchases of any other type of security are not covered—even if related to the common stock (e.g., preferred stock, warrants, rights, convertible debt securities, options, or security futures products).⁸ Because Rule 10b-18 is not intended to apply in contexts where the issuer has a heightened incentive to manipulate the market price of its securities, 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.⁹ The safe harbor also does not confer absolute protection from all liability for purchases (e.g., purchases that are part of a plan or scheme to evade the federal securities laws)—even if made in technical compliance with the Rule.¹⁰ Rather, the safe harbor provides only that certain, specific provisions of the securities laws will not be considered to have been violated solely by reason of the manner, timing, price, or volume of such repurchases, provided that the repurchases are made within the limitations of the Rule.

C. Conditions of the Current Rule

Rule 10b-18 provides a safe harbor for purchases on a given day. To come within the safe harbor for that day, an issuer must satisfy the Rule's manner, timing, price, and volume conditions when purchasing its own common stock in the market.¹¹ Failure to meet any one of the four conditions will disqualify the issuer's purchases from the safe harbor for that day.

1. Manner of Purchase Condition

The manner of purchase condition requires an issuer to use a single broker or dealer per day to bid for or purchase its common stock. This requirement is

limits to be observed by those persons not covered by the safe harbor nor the appropriate limits to be observed when repurchasing securities other than common stock.

⁷ 17 CFR 240.10b-18(a)(3) and (4).

⁸ The safe harbor also is not available for issuers repurchasing their stock using forward contracts or accelerated share repurchase programs. Nor is the safe harbor available for an issuer's put writing, call purchasing, or purchases of stock upon exercise of such puts and calls.

⁹ 17 CFR 240.10b-18(a)(3)(i)-(vii).

¹⁰ See *supra* note 5.

¹¹ 17 CFR 240.10b-18(b)(1)-(4).

intended to avoid the appearance of widespread trading in a security that could result if the issuer uses many brokers or dealers to repurchase its stock.¹² The "single broker or dealer" condition, however, applies only to Rule 10b-18 purchases that are "solicited" by or on behalf of the issuer. Accordingly, the issuer may purchase shares from more than one broker or dealer if the issuer does not solicit the transactions. An issuer must evaluate whether a transaction is "solicited" by or on behalf of the issuer, depending on the facts and circumstances of each case.¹³

Moreover, where an issuer engages a single coordinating broker or dealer to make its Rule 10b-18 purchases, the broker or dealer can make (consistent with the single broker or dealer condition) appropriate and customary arrangements with other brokers or dealers, including exchange specialists, or "two-dollar" brokers on exchange floors to execute repurchases.¹⁴

2. Timing Condition

The timing condition restricts the periods during which the issuer may bid for or purchase its common stock. Currently, this condition excludes from the safe harbor purchases at the opening and during the last half hour of trading because market activity at such times is considered to be a significant indicator of the direction of trading, the strength of demand, and the current market value of the security.¹⁵ Therefore, where

¹² 1980 Proposing Release, *supra* note 4, 45 FR at 70891.

¹³ Although Rule 10b-18 does not define "solicitation," we would not consider the issuer's disclosure and announcement of a repurchase program alone as necessarily causing a subsequent purchase to be deemed "solicited" by or on behalf of an issuer. See 1982 Adopting Release, *supra* note 4, 47 FR at 53337.

¹⁴ See 1980 Proposing Release, *supra* note 4, 45 FR at 70898. See also Letter regarding Optimark System (February 10, 2000) (stating that, consistent with the Rule's single broker or dealer condition, an issuer could utilize one or more clearing brokers solely for purposes of clearing and settling executed Rule 10b-18 purchases).

¹⁵ 17 CFR 240.10b-18(b)(2) currently provides that an issuer's purchase may not be the opening transaction reported to the consolidated system, nor may the issuer purchase during the last half hour before the scheduled close of trading in the principal market (including during the last half hour before the scheduled close of trading on the exchange on which the purchase is to be made) or the last half-hour before termination of the period in which last sale prices are reported to the consolidated system (whichever is applicable). These limitations apply regardless of a security's trading characteristics (e.g., liquidity or daily trading volume). 17 CFR 240.10b-18(b)(2)(i)-(iii). The prohibition of Rule 10b-18 bids and purchases near the close of trading is to prevent the issuer from creating or sustaining a high bid or transaction price at or near the close of trading. "Other"

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⁴ Securities Exchange Act Release No. 19244 (November 17, 1982), 47 FR 53333, 53334 (November 26, 1982) (1982 Adopting Release). Since 1967, the Commission has considered on several occasions the issue of whether to regulate an issuer's market purchases of its own securities. The Commission first proposed Rule 10b-10 to govern issuer repurchases in connection with proposed legislation that became the Williams Act Amendments of 1968. Pub. L. No. 90-439, 82 Stat. 454 (July 29, 1968), reprinted in Hearings on S. 510 before Senate Committee on Banking and Currency, 90th Cong., 1st Sess. 214-216 (1967). The Commission then published for public comment proposed Rule 13e-2 in 1970, 1973, and 1980. Rule 13e-2, which was later withdrawn with the adoption of Rule 10b-18, would have been a prescriptive rule with mandatory disclosure requirements, substantive purchasing limitations, and general anti-fraud liability. Securities Exchange Act Release Nos. 8930 (July 13, 1970), 35 FR 11410 (July 16, 1970); 10539 (December 6, 1973), 38 FR 34341 (December 13, 1973); and 17222 (October 17, 1980), 45 FR 70890 (October 27, 1980) (1980 Proposing Release).

⁵ However, some repurchase activity that meets the safe harbor conditions may still violate the anti-fraud and anti-manipulation provisions of the Exchange Act. For example, as the Commission noted in 1982 when adopting Rule 10b-18, "Rule 10b-18 confers no immunity from possible Rule 10b-5 liability where the issuer engages in repurchases while in possession of favorable, material nonpublic information concerning its securities." 1982 Adopting Release, *supra* note 4, at 47 FR 53333. Thus, regardless of whether an issuer's repurchases technically satisfy the conditions of the Rule, 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).

⁶ See 17 CFR 240.10b-18(d). Moreover, the safe harbor is not intended to define the appropriate