

period—without us having to exclude all issuer repurchase activity from the safe harbor. The revised language strikes a balance between safeguarding against the heightened potential for manipulative abuse and the need for issuers to have the safe harbor available for routine repurchase activity. We believe this approach will foster market integrity while providing issuers with the ability to make purchases in the ordinary course and the flexibility to purchase outside the safe harbor if they choose to do so.<sup>39</sup>

We received other comments suggesting further changes that we have not incorporated into the amended Rule because we continue to believe that issuers may have an incentive to manipulate in the situations raised by commenters. For example, some commenters suggested the safe harbor should be available for transactions that the issuer deems immaterial. They also expressed concern that, in addition to lengthy regulatory delays, multiple, overlapping transactions would similarly preclude an issuer from relying on the safe harbor for extensive time periods.

Materiality is judged from the perspective of a reasonable investor, not a subjective issuer.<sup>40</sup> Under this standard, the transaction may be material regardless of whether the issuer deems it material. We also recognize that, under the merger exclusion language, an issuer conducting multiple acquisitions may experience a long time period in which the safe harbor is unavailable. While this time period may be long, the issuer may have a heightened incentive to manipulate the price of its stock.<sup>41</sup> Accordingly, with the exception of the repurchases made pursuant to the merger exclusion (as described above) or during an all-cash transaction, we do not believe that it is appropriate to make the safe harbor available after announcement of a merger or other covered transaction, even in situations where the period of unavailability is longer than average.

In summary, Rule 10b-18 is intended to protect issuer repurchases from

manipulation charges when the issuer has no special incentive to interfere with the ordinary forces of supply and demand affecting its stock price. Therefore, it is not appropriate for the safe harbor to be available when the issuer has a heightened incentive to manipulate its share price. As discussed above, in these circumstances, issuers have the flexibility to purchase outside the safe harbor (unless constrained by other provisions of law) without any presumption that they are engaged in manipulation. While issuers argue that they are reluctant to repurchase outside the safe harbor, we do not find that argument sufficiently persuasive to make the safe harbor available where there is the heightened potential for issuer manipulation.

#### 4. Repurchases Effected Outside the United States

In the Proposing Release, we sought comment as to whether the Rule 10b-18 safe harbor should apply to issuer repurchases effected in markets outside of the United States. While the safe harbor currently applies only to issuer repurchases effected in the United States, a few commenters suggested that we amend Rule 10b-18 to apply to non-U.S. markets.<sup>42</sup> One commenter urged us to extend the safe harbor to bids and purchases in non-U.S. markets, with the price, volume, timing, and manner conditions modified so as to apply on a market-by-market basis in order to address certain practical problems associated with shares traded in multiple markets around the world.<sup>43</sup> Another commenter, however, stated that issuers are presently comfortable accessing liquidity outside the United States without having to extend the safe harbor.<sup>44</sup>

After considering the comments, we have determined not to extend the safe harbor to issuer repurchases effected outside of the United States. The safe harbor was crafted based on the manner in which the securities markets operate in United States. We do not believe currently that a workable rule could be created for universal application both inside *and* outside the United States, without unnecessarily complicating or undermining the utility of the safe harbor. Nor is there currently a practical way for us to adequately monitor the impact of an issuer's repurchase activity outside the United States. Moreover, many of the non-U.S. markets have their

own rules and disclosure requirements regarding issuer repurchase activity, some of which also provide a safe harbor, which should provide issuers with sufficient guidance and protection when repurchasing their securities outside the United States. Finally, there is no presumption that purchases made without benefit of the safe harbor are manipulative.

#### 5. Purchases by or for Affiliated Purchasers

The safe harbor applies to Rule 10b-18 purchases made by or for an "affiliated purchaser" of the issuer. An "affiliated purchaser" of the issuer is currently defined as a person acting in concert<sup>45</sup> with the issuer for the purpose of acquiring the issuer's securities, or any affiliate<sup>46</sup> that, directly or indirectly, controls the issuer's Rule 10b-18 purchases, whose purchases are controlled by, or are under common control with, those of the issuer.<sup>47</sup> The term "affiliated purchaser," however, does not include a broker, dealer, or other person solely by his effecting Rule 10b-18 purchases on behalf of the issuer (or for the issuer's account), or an officer or director of the issuer solely by his participation in the decision to authorize the issuer to effect Rule 10b-18 purchases.

We believe the current definition of "affiliated purchaser" has proved to be a workable one, and that an expanded, more complex definition, would unnecessarily complicate the Rule. Therefore, we are not revising the definition of "affiliated purchaser" at this time, except to add the words "directly or indirectly" to the "acting in concert" language in subparagraph (a)(3)(i) of the Rule in order to make it consistent with the "acting in concert" language in Regulation M.<sup>48</sup>

#### B. Amendments to the Purchasing Conditions

##### 1. Manner of Rule 10b-18 Purchases

While we did not propose making any substantive changes to the "single broker or dealer" condition, several commenters asked us to clarify the application of the single broker or dealer

<sup>39</sup> For example, an issuer is free to repurchase its securities, although not in reliance on the safe harbor, between the time of the announcement of a merger or other covered transaction and beginning of the Regulation M restricted period tied to the proxy mailing. As with any non-safe harbor repurchase, there is no presumption of manipulation. Moreover, repurchases by independent agents for plans also can continue throughout this period (as these repurchases would not be attributable to the issuer).

<sup>40</sup> See, e.g., *TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976).

<sup>41</sup> During that time, for example, the issuer may try to maintain or increase its stock price in order to defend against a hostile bidder.

<sup>42</sup> See comment letters from Cleary, Gottlieb, Steen & Hamilton (Cleary); Fed. Reg. Committee; and Sullivan.

<sup>43</sup> See comment letter from Fed. Reg. Committee.

<sup>44</sup> See comment letter from Merrill.

<sup>45</sup> 17 CFR 240.10b-18(a)(2)(i). The "acting in concert" standard currently includes persons acting with the issuer in purchasing the issuer's securities, regardless of whether the purchases are made for the account of the issuer itself. 1980 Proposing Release, *supra* note 4, 45 FR at 70895.

<sup>46</sup> "Affiliate" is currently defined to mean any person that directly or indirectly controls, is controlled by, or is under common control with, the issuer. 17 CFR 240.10b-18(a)(1).

<sup>47</sup> 17 CFR 240.10b-18(a)(2)(i) and (ii).

<sup>48</sup> See 17 CFR 242.100.