

condition to issuer repurchases effected through electronic communication networks (ECNs) or other alternative trading systems (ATSs) (which are registered as broker-dealers).⁴⁹ We believe that, consistent with the Rule's single broker or dealer condition, issuers can effect repurchases through an ECN (or other ATS) directly. Issuers, however, cannot use both an ECN (or other ATS) directly and a non-ECN (or other non-ATS) broker-dealer on any single day, as this could create the perception of widespread demand. If the issuer chooses to use a non-ECN (or other non-ATS) broker-dealer to conduct all its repurchase activity on a particular day, however, that broker-dealer can access ECN (or other ATS) liquidity on behalf of the issuer on that day.⁵⁰ In this regard, the ECN (or other ATS) would simply be acting in its capacity as an execution venue or market center.

2. Time of Purchases

We are adopting the proposed amendments that add an ADTV value and public float value test to determine the time when an issuer must be out of the market before the scheduled close of trading in order to qualify for the safe harbor.⁵¹ Commenters expressed overwhelming support for expanding the safe harbor's timing condition to allow issuers whose securities are more liquid and, thus, less susceptible to manipulation to stay in the market longer. As adopted, limitations on purchases at the close would vary (*i.e.*, either 10 or 30 minutes before the scheduled close of trading) depending on the security's ADTV value and public float value. The timing modifications are designed to reflect the relative liquidity of the security and, therefore, the likelihood of an issuer that is active in the market affecting the closing price.⁵² As such, the modifications recognize that the current Rule's last half-hour restriction (*i.e.*, that

limits an issuer from repurchasing its securities during the 30 minutes before the scheduled close of trading) may be unnecessarily long to prevent issuers of highly liquid securities from influencing market prices and volume near the close of trading. At the same time, the modifications continue to provide a clear standard whereby issuers and their affiliates would know when they must be out of the market in order to qualify for the safe harbor.

As adopted, the timing condition would work as follows: to qualify for the safe harbor, issuers of more liquid securities (*i.e.*, those having an ADTV value of \$1 million or more and a public float value of \$150 million or more),⁵³ may not bid for or purchase their securities during the last ten minutes before the scheduled close of the primary trading session (*i.e.*, 9:30 a.m.–4 p.m. price discovery session) in the principal market for the security, and during the last ten minutes before the scheduled close of the primary trading session in the market where the purchase is made.⁵⁴ These modifications allow issuers of more actively traded securities, which are considered to be less susceptible to manipulation, to stay in the market longer.

Issuers of all other eligible securities (*i.e.*, those having an ADTV value of less than \$1 million or a public float value of less than \$150 million) may not bid

for or purchase their securities during the last 30 minutes before the scheduled close of the primary trading session in the principal market for the security, and during the last 30 minutes before the scheduled close of the primary trading session in the market where the purchase is made.⁵⁵

We had proposed to explicitly exclude Rule 10b–18 purchases “after the termination of the period in which last sale prices are reported in the consolidated system” in order to emphasize that the safe harbor applies only to reported, open market purchases.⁵⁶ However, since the period “after termination” necessarily would be outside the safe harbor, we believe the proposed amendment is unnecessary and, therefore, we are not adding this language to the timing condition.

In the Proposing Release, we also sought comment as to whether the Rule's timing condition should be modified to allow issuers of more liquid securities (*i.e.*, those having an ADTV value of \$1 million or more and public float value of \$150 million or more) to effect a Rule 10b–18 purchase as the opening transaction. Only one commenter favored this proposal. However, because the opening transaction continues to set the tone for that day's trading session, the safe harbor will continue to preclude an issuer from being the opening (regular way) purchase reported in the consolidated system.⁵⁷

3. Price of Purchases

We are adopting the proposed amendment to apply a uniform price condition that limits all issuers to purchasing their securities at a price that does not exceed the highest independent bid or the last independent transaction price, whichever is higher, quoted or reported in the consolidated system.⁵⁸ For those securities that are

⁴⁹ Amended Rule 10b–18(b)(2)(ii). The timing amendment incorporates Regulation M's standards and methods of calculating ADTV and public float value. Under Regulation M, issuers with a security that has an ADTV value of \$1 million or more and a public float value of \$150 million or more are excluded from Rule 101 of Regulation M under its “actively-traded securities” exception. See 17 CFR 242.101(c)(1). We selected \$150 million for the public float value test because the securities of issuers with a public float value at or above this threshold, and that also have an ADTV value of at least \$1 million, are considered to have a sufficient market presence to make them less likely to be manipulated. See Securities Exchange Act Release No. 38067 (December 20, 1996), 62 FR 520 (January 3, 1997). Moreover, the public float value test is intended in part to exclude issuers from the “actively-traded securities” category where a high trading volume level is an aberration. *Id.*

In calculating the dollar value of ADTV, any reasonable and verifiable method may be used. For example, it may be derived from multiplying the number of shares by the price in each trade, or from multiplying each day's total volume of shares by the closing price on that day. Public float value (*i.e.*, the aggregate market value of common equity securities held by non-affiliates of the issuer) is to be determined in the manner set forth on the front page of Form 10–K, even if the issuer of such securities is not required to file Form 10–K. For reporting issuers, the public float value should be taken from the issuer's most recent Form 10–K or based upon more recent information made available by the issuer.

⁵⁴ Amended Rule 10b–18(b)(2)(ii). This means that an issuer may not purchase in any market during the specified periods.

⁵⁵ Amended Rule 10b–18(b)(2)(iii).

⁵⁶ See Proposing Release, *supra* note 1.

⁵⁷ Amended Rule 10b–18(b)(2)(i). For purposes of Rule 10b–18's timing and price conditions, Amended Rule 10b–18(a)(6) defines “consolidated system” to mean “a consolidated transaction or quotation reporting system that collects and publicly disseminates on a current and continuous basis transaction or quotation information in common equity securities pursuant to an effective transaction reporting plan (as defined in 17 CFR 240.11Aa3–1) or a national market system plan (as defined in 17 CFR 240.11Aa3–2).”

⁵⁸ Amended Rule 10b–18(b)(3). The previous price limitations under Rule 10b–18 varied depending on the market for the security. To further simplify the Rule, the uniform price condition incorporates the proposed definitions of “highest independent bid” and “last independent transaction price” into the uniform price condition (*i.e.*, rather than separately defining these terms).

⁴⁹ See Regulation ATS, 17 CFR 242.300.

⁵⁰ See amended Rule 10b–18(b)(1)(iii).

⁵¹ See amended Rule 10b–18(b)(2). See also Proposing Release, *supra* note 1.

⁵² One concern we are addressing is that the issuer may attempt to “mark the close” (*i.e.*, determine the final transaction price reported in the market). See 1980 Proposing Release, *supra* note 4, 45 FR at 70899. The Commission has brought several marking the close cases. See, *e.g.*, *S.E.C. v. Schiffer*, 1998 U.S. Dist. LEXIS 8579, Fed. Sec. L. Rep. (CCH) p. 90247 (S.D.N.Y. 1998) (issuer orchestrated over several months purchases effected at or shortly before the close of trading in order to increase the issuer's stock price); *Thomas C. Kocherhans*, Securities Exchange Act Release No. 36556 (December 6, 1995), 60 SEC Docket 2589; *Myron S. Levin*, Securities Exchange Act Release No. 31124 (September 1, 1992); *S.E.C. v. John G. Broumas*, Civil Action No. 91–2449 (D.D.C.), Litigation Release No. 12999 (September 27, 1991).