

that rely heavily on block purchases to implement their repurchase programs,<sup>80</sup> we have decided to allow issuers to make (within the safe harbor) one block purchase per week, provided that the issuer does not make any other Rule 10b-18 purchases on that day. Thus, alternatively, once each week the issuer may purchase one block of its common stock *in lieu of* purchasing under the 25% volume limitation for that day.<sup>81</sup> However, shares purchased by the issuer relying on this amended block exception may not be included when calculating a security's four-week ADTV under the Rule. This amended block exception is intended to provide issuers with moderate or low ADTV greater flexibility in carrying out their repurchase programs.<sup>82</sup> However, this amended block exception does not include any amount of securities that a broker or dealer, acting as principal, has accumulated for the purpose of selling to the issuer, if the issuer knows or has reason to know that such amount was accumulated for such purpose.<sup>83</sup>

<sup>80</sup> These commenters claim that they are unable to effect repurchases within the safe harbor's parameters or maintain effective and efficient repurchase programs without the block exception. See, e.g., comment letters from Morgan; National Association of Real Estate Investment Trusts (NAREIT); SIA; Skadden, Arps, Meagher & Flom, LLP (Skadden); and Sullivan.

<sup>81</sup> For purposes of the amended block exception, we are retaining the current "block" definition. See Amended Rule 10b-18(a)(5).

We carefully considered whether to allow issuers to effect one block purchase per day (rather than per week). However, commenters noted that even one block purchase for a thinly traded issuer could be greater than 25% of its ADTV on a particular day. Rule 10b-18's conditions are intended to minimize the market impact of an issuer's repurchases, thereby allowing the market to establish a security's price based on independent market forces without undue influence by the issuer. Allowing small, thinly traded issuers to use the block exception each trading day so that they might enjoy safe harbor protection for purchasing more than 25% of their ADTV for each of these days is inconsistent with the purpose of the Rule, investor protection and market integrity. If there is no true volume limitation, that condition is meaningless and safe harbor protection is inappropriate. We stress, however, that there is no presumption of manipulation if the issuer decides to purchase a block outside the safe harbor.

<sup>82</sup> Of course, the issuer may repurchase under its 25% volume limitation on the other days of that week. Allowing one block purchase per week should also help certain thinly traded regulated issuers that are limited under relevant law in the number of shares they can issue (and are, therefore, dependent upon repurchasing to fund benefit programs), to purchase within the safe harbor. See, e.g., comment letter from Bank Mutual.

<sup>83</sup> This block exception also excludes any amount that a broker or dealer has sold short to the issuer, if the issuer knows or has reason to know that the sale was a short sale. Amended Rule 10b-18(a)(5). Because commenters generally believed that the proposed 500-share alternative volume limit was too low, and because we are already providing issuers with greater flexibility by allowing them to effect one block purchase per week (as discussed above), we have decided not to adopt this proposal.

We also wish to reiterate that Rule 10b-18 is not the exclusive means by which issuers and their affiliated purchasers may effect purchases of the issuer's stock without manipulating the market. In fact, the Commission has long recognized that there may be circumstances under which an issuer could effect repurchases outside the volume limitation without raising manipulative concerns, and indeed that failure to satisfy the conditions of the safe harbor does not give rise to any presumption that the activity is manipulative.<sup>84</sup>

#### IV. Applicability of the Safe Harbor During After-Hours Trading Sessions

Since the adoption of Rule 10b-18, the opportunity for investors to trade securities after the markets' regular trading sessions ("after-hours trading") has increased.<sup>85</sup> The Division of Market Regulation (Division) has interpreted Rule 10b-18 to be available to purchases effected during limited off-hours trading (OHT) sessions at the primary market's closing price.<sup>86</sup> Specifically, the Division interpreted Rule 10b-18's "one-half hour before the scheduled close of trading" language to refer to an exchange's primary (or regular) trading session (*i.e.*, 9:30 a.m.-4 p.m. price discovery session), rather than OHT sessions.

In the Proposing Release, we asked whether the safe harbor should be available to other issuer repurchases effected during after-hours trading and, if so, how should the safe harbor conditions apply to each separate trading session in one day. One commenter suggested that the safe harbor be available as long as the consolidated reporting system is open, so that the safe harbor would be available up to 30 minutes prior to the close of the consolidated tape with a price limit that is no higher than the closing price of the regular trading session (subject to bids or sales subsequently reported to the tape by other markets).<sup>87</sup> Two other commenters favored extending the safe harbor to after-hours trading sessions and made specific suggestions as to how the

conditions should apply to this second trading session.<sup>88</sup> Other commenters simply requested clarification with respect to whether the safe harbor is available in the after-hours OTC session and, if so, whether the timing condition would apply in the after-hours OTC session.

After considering the comments, we have decided to extend the safe harbor to issuer repurchases effected after-hours (while the consolidated system is still open) and that are effected at prices that do not exceed the lower of the closing price of the primary trading session in the principal market for the security and any lower bids or sale prices subsequently reported in the consolidated system by other markets.<sup>89</sup> This amendment will allow issuers to provide a source of liquidity, while still providing investor protection. Such purchases, of course, would still need to comply with the other three conditions of the safe harbor, with the following modifications. We are modifying the Rule to permit the issuer to use a broker or dealer for its after-hours Rule 10b-18 purchases different from the broker or dealer that it used during normal trading hours, because it may be impractical for an issuer to use the same broker-dealer in both a primary trading session and an after-hours trading session in one day.<sup>90</sup> The amended Rule, however, precludes the issuer from effecting a Rule 10b-18 purchase as the opening transaction of the after-hours trading session (because the

<sup>88</sup> See comment letters from Fed. Reg. Committee and Sullivan.

<sup>89</sup> For example, in the case of a security that is traded in the NYSE OHT session (*e.g.*, Crossing Session I) and other markets (*e.g.*, the Pacific Stock Exchange (or in the third market)), if the highest current independent bid or the last independent sale price reported in the consolidated system is lower than the NYSE closing price, the safe harbor would not be available for closing-price single-sided orders entered during Crossing Session I. See Amended Rule 10b-18 (b)(2)(iv).

For many market centers, including the NYSE and the Nasdaq Stock Market, primary (or regular) trading sessions currently run from 9:30 a.m. to 4 p.m. Eastern Time. For securities that do not have a principal market, the issuer would need to look to the closing price of the primary trading session in the listing market for the security.

<sup>90</sup> These amendments address the proposals raised in the Guzman & Company's Petition for Rulemaking (filed on May 21, 1999), which is publicly available in File No. 4-424 in the Commission's Public Reference Room. The Guzman petition requested that the Commission amend Rule 10b-18's timing and pricing conditions to permit an issuer to effect repurchases during after-hours trading sessions so long as the purchases are effected at prices lower than the last reported price on the primary exchange or market on which the security of the issuer is traded. The petition also requested that the Rule be amended to permit an issuer to utilize a different broker or dealer for after-hours Rule 10b-18 purchases than is used during normal trading hours.

<sup>84</sup> See 1982 Adopting Release, *supra* note 4.

<sup>85</sup> For example, both the New York Stock Exchange, Inc. (NYSE) and the American Stock Exchange provide crossing sessions in which matching buy and sell orders can be executed at 5:00 p.m. at the exchanges' 4 p.m. closing prices.

<sup>86</sup> See Letter Regarding Operation of OHT Session by the NYSE (June 13, 1991); Letter Regarding Operation of OHT Session by the AMEX (August 5, 1991); and Letter Regarding AMEX After-Hours Trading Facility (May 6, 1997) (the OHT Session letters).

<sup>87</sup> See comment letters from Merrill and T. Rowe Price Associates, Incorporated (T. Rowe).