

opening transaction may be considered to be a significant indicator of the direction of trading and the strength of demand in the after-hours trading session), but permits the issuer to repurchase until the termination of the period in which last sale prices are reported in the consolidated system. The Rule's volume calculation would carry over from the regular trading session.

## V. Rule 10b-18 Alternative Conditions

### A. Proposed Amendment to Rule 10b-18 Alternative Conditions

In view of the extreme market volatility that would trigger a circuit breaker and the desirability of facilitating liquidity in that context, we are adopting our proposed amendment to modify the safe harbor alternative conditions (which are applicable only during the trading session immediately following a market-wide trading suspension), by increasing the 25% volume limitation to 100% of a security's ADTV.<sup>91</sup> The amendment would permit issuers to purchase more securities within the safe harbor during these rare, but critical periods of severe market decline.<sup>92</sup> All the commenters expressed strong support for the increased alternative volume limit, citing reasons such as enhanced liquidity and issuer flexibility. In addition, we will continue to view

market situations other than market-wide trading suspensions, on a case-by-case basis, relying on our emergency and exemptive authority in Sections 12(k)(2) and 36 of the Exchange Act, as we did following the reopening of the markets after September 11, 2001.<sup>93</sup>

### B. NYSE Petition for Rulemaking

In the Proposing Release, we sought comment as to whether Rule 10b-18's "alternative conditions" should apply where there is a significant decline in the market price of an *individual* stock (i.e., in the absence of a market-wide trading suspension), as suggested by the NYSE in its petition.<sup>94</sup> Only one commenter asked that we adopt the rules suggested by the NYSE in its petition concerning "special purchases" by independent trustees during periods of volatility. In contrast to the rare occurrence of a market-wide trading suspension (as discussed above), we are concerned about the likely frequency and market impact of such "special purchases," as well as the feasibility of monitoring a program that involves market declines in *individual* stock prices. In addition, because the petition calls for the purchases to be made by an "independent trustee," we believe such purchases may not even be attributable to the issuer in order for the safe harbor to apply. Thus, we have determined not

to implement the proposals set forth in the NYSE's petition for rulemaking.

## VI. Disclosure

To enhance the transparency of issuer repurchases, we proposed that Regulations S-K and S-B, and Forms 10-Q, 10-QSB, 10-K, 10-KSB, 20-F (for foreign private issuers), and N-CSR (for closed-end funds) be amended to require periodic disclosure of all issuer repurchases of equity securities. These disclosure requirements would be independent of the Rule 10b-18 safe harbor.

Under the proposed amendments, issuers would be required to disclose, among other things, the total number of shares repurchased during the past quarter, the average price paid per share, the number of shares that were purchased as part of a publicly announced repurchase plan, and the maximum number (or approximate dollar value) of shares that may yet be purchased under the plans or programs.

Most of the commenters expressed support for enhanced transparency through the proposed disclosure and agreed that issuer disclosure in periodic filings of repurchases of their equity securities would provide investors with useful information about the level, frequency and purpose of such activity by an issuer and its affiliates.<sup>95</sup> One commenter especially applauded the fact that the proposed amendments call for increased transparency of issuer repurchases by requiring disclosure of all such repurchases, regardless of whether such repurchases fall within the Rule 10b-18 safe harbor.<sup>96</sup> Another commenter stated that repurchase disclosures by issuers will ensure that all market participants are aware of the size and scope of the repurchase program.<sup>97</sup> In addition, requiring issuers to provide disclosure with respect to proposed and actual repurchases would make information that can be relevant in making investment decisions available to the market.<sup>98</sup>

However, commenters generally believed that disclosure of the broker-dealer's identity is an unnecessary disclosure of confidential business information that could provide an informational advantage to other market participants.<sup>99</sup> Two commenters

<sup>91</sup> Amended Rule 10b-18(c)(2). See also text accompanying note 93, *infra*, regarding the Commission's emergency orders where the volume limitation was temporarily increased from 25% to 100% of a security's ADTV following the events of September 11, 2001. The Rule defines a "market-wide trading suspension" as a market-wide trading halt of 30 minutes or more that is imposed pursuant to the rules of a national securities exchange or a national securities association in response to a market-wide decline during a single trading session; or declared by the Commission pursuant to its authority under Section 12(k) of the Act (15 U.S.C. 78j(k)). See Amended Rule 10b-18(a)(7). For example, the alternative volume condition would apply in the trading session following a trading halt pursuant to NYSE Exchange Rule 80B or Market Closing Policy of the NASD. The Commission approved the NASD's market closing policy statements, codified in IM-4120-3. Securities Exchange Act Release No. 39846 (April 9, 1998), 63 FR 18477 (April 15, 1998) (Circuit Breaker Approval Order). See also 17 CFR 240.10b-18(c); Securities Exchange Act Release No. 41905 (September 23, 1999), 64 FR 52428 (September 29, 1999) (modifying the timing condition to include in the safe harbor issuer purchases made at the reopening and during the last half-hour prior to the scheduled close of trading or at the next day's opening if a market-wide trading suspension was in effect at the scheduled close of trading).

<sup>92</sup> At such times, an issuer would still also have to comply with the manner, price, and alternative timing conditions in Rule 10b-18 to satisfy the requirements of the safe harbor. See generally The October 1987 Market Break, *supra* note 77 at pp. 6:1-6:15 (noting the increase in trading volume and the positive impact of issuer repurchases following the October 1987 market break).

<sup>93</sup> On September 14, 2001, the Commission issued an "Emergency Order Pursuant to Section 12(k)(2) of the Exchange Act Taking Temporary Action to Respond to Market Developments." Securities Exchange Act Release No. 44791 (September 14, 2001), 66 FR 48494 (September 20, 2001). This Emergency Order temporarily modified certain Commission rules and regulations governing issuer stock repurchases for an initial five-day period beginning September 17, 2001 and ending September 21, 2001. The Commission extended the period for an additional five days, ending on September 28. Securities Exchange Act Release No. 44827 (September 21, 2001), 66 FR 49438 (September 27, 2001). On September 28, 2001, the Commission used its exemptive authority under Section 36 of the Exchange Act to temporarily modify certain conditions of Rule 10b-18 for issuers that repurchased their own common stock during the period October 1-12, 2001. Securities Exchange Act Release No. 44874 (September 28, 2001), 66 FR 51076 (October 5, 2001).

In the event that there is another "market emergency" that does not fit within the meaning of a "market-wide trading suspension" (as defined under the rule), as was the case with the events following September 11, the Commission would have the same emergency and exemptive authority as above (i.e., under Sections 12(k)(2) and 36(a)(1) of the Exchange Act) to modify the safe harbor conditions, as it deems necessary.

<sup>94</sup> The NYSE's Petition for Rulemaking seeks an amendment to Rule 10b-18 to make the safe harbor available to an issuer for a category of "special purchases" effected by an independent trustee during a period of unusual volatility in the issuer's stock. The petition is publicly available in File No. 4-446 in the Commission's Public Reference Room.

<sup>95</sup> See, e.g., comment letter from Cleary.

<sup>96</sup> See comment letter from NAREIT.

<sup>97</sup> See comment letter from WVS Financial Corporation (WVS).

<sup>98</sup> See comment letter from Investment Company Institute (ICI).

<sup>99</sup> See comment letters from Cleary; Dell; Emerson; Fed. Reg. Committee; Professor David Ikenberry, University of Illinois (Ikenberry); Merrill; Morgan; SIA; Sullivan; T. Rowe; Valero; and WVS.