

allows issuers whose securities are actively traded to stay in the market for—a longer period of time—10 minutes instead of 30 minutes before the scheduled close of trading. The modified timing condition for actively traded issuers will not impose a significant burden on small issuers because small issuers can still make safe harbor purchases during a trading day or elect to make repurchases outside the safe harbor. They would be treated differently under the timing condition for only a 20-minute period. We believe that differing treatment for issuers that meet the actively traded test (ADTV and public float) and those that do not is necessary because issuer repurchases of less liquid securities would likely have a greater impact on the price of those securities. We do not believe that it would be appropriate or in furtherance of investor protection and market integrity to provide safe harbor eligibility for repurchases with a greater potential for undue issuer influence. We believe that allowing issuers of less liquid securities to remain in the market with the protection of the safe harbor between 30 and 10 minutes prior to the market close could compromise market integrity and erode investor confidence. We expect that the adopted timing amendment will benefit (1) the marketplace and investors by providing additional liquidity, and (2) traders by allowing them to implement a trading strategy for a longer period during the day. We believe that the amendment appropriately recognizes the minimal risk that large issuers' repurchases will unduly influence the market, thereby allowing the market to establish security prices based on independent market forces, and the difference in issuer treatment for 20 minutes a day does not create a significant anti-competitive burden on non-actively traded issuers. Further, we do not believe that the adopted safe harbor amendments should have a significant effect on competition because all issuers have the option of complying with the manner, volume, time, and price conditions.

With respect to disclosure, the adopted amendments to Forms 10-K, 10-KSB, 10-Q, 10-QSB, 20-F and N-CSR apply equally to all filers who announce that they intend to make repurchases. Thus, we do not believe that the amendments to these forms will have an anti-competitive effect.

We believe that the Rule 10b-18 safe harbor, as amended, should improve market efficiency in the trading session following a market-wide trading suspension by providing enhanced liquidity. We further believe the adopted amendments will improve

market efficiency by providing greater clarity, uniformity, and simplification of the safe harbor conditions. An efficient market generally promotes capital formation.

Moreover, the adopted disclosure amendments to Forms 10-K, 10-KSB, 10-Q, 10-QSK, 20-F and N-CSR should enhance market efficiency by providing additional, readily accessible information to investors concerning issuer repurchase activity. Enhanced disclosure will allow investors to make better-informed investment decisions. We believe the increased transparency of issuer activity will improve market efficiency and bolster investor confidence in our securities markets. Informed investor decisions generally promote market efficiency and capital formation.

#### **X. Final Regulatory Flexibility Analysis**

The Final Regulatory Flexibility Analysis (FRFA) has been prepared in accordance with the Regulatory Flexibility Act.<sup>130</sup> This FRFA relates to adopted amendments regarding Rule 10b-18, Regulations S-K, S-B, Forms 10-Q, 10-QSB, 10-K, 10-KSB, 20-F, N-CSR, and N-23C-1, and Rule 23c-1 under the Investment Company Act.

##### *A. Need for and Objectives of the Amendments*

The adopted Rule 10b-18 amendments fulfill several objectives including (1) simplifying and updating the Rule; (2) providing additional liquidity in times of market stress; (3) fostering investor confidence; and (4) providing a risk management tool to issuers. Moreover, the adopted amendments are consistent with the objective of minimizing the effects of an issuer's repurchases on the market price of an issuer's common stock thereby furthering our objective of fostering markets where investors, and particularly an issuer's shareholders, should be able to rely on a common stock price that is set by independent market forces and not influenced in a manipulative manner by the issuer.

First, the amendments simplify and update the Rule in light of our experience with its operation and to reflect market developments since its adoption. The adopted amendments modify the definition of "Rule 10b-18 purchase" to incorporate the current "Rule 10b-18 bid" definition, and to apply a uniform price condition among issuers. The safe harbor amendments also clarify the scope of the merger exclusion and modify the timing condition for actively traded issuers.

Second, the amended volume condition provides increased liquidity to the markets by easing the volume condition in the trading session following a market-wide trading suspension, and provides an alternative volume condition allowing issuers to purchase one block or 25% of their ADTV on a given day. Third, the adopted amendments foster investor confidence in market integrity by maintaining reasonable limits on issuer repurchasing activity within the safe harbor, and facilitating pricing by independent market forces. Fourth, the adopted amendments provide increased clarity to issuers relying on the Rule to better manage the risk of potential liability associated with repurchases.

The prime objective of the adopted disclosure amendments is to provide investors with useful, timely, and readily accessible information about issuer repurchases. The adopted amendments to Regulations S-K, S-B, Forms 10-Q, 10-QSB, 10-K, 10-KSB, 20-F and N-CSR provide investors and the marketplace with enhanced transparency concerning issuers' repurchases in order to better assess investment decisions and issuers generally. The increased transparency regarding repurchasing will promote enhanced evaluation of issuers, their repurchases and the effects of those repurchases on the issuers' stock prices and the market place. The adopted amendments also provide a means to monitor and assess the level and impact of issuers' repurchases.

##### *B. Significant Issues Raised by Public Comments*

The Initial Regulatory Flexibility Analysis (IRFA) appeared in the Proposing Release. We requested comment on the IRFA, including the number of issuers conducting repurchase programs that are small entities, the impact the proposals would have on small entities, and how to quantify the impact. We received no comment letters regarding the IRFA.

##### *C. Small Entities Subject to the Amendments*

Exchange Act Rule 0-10(a)<sup>131</sup> defines an entity, other than an investment company, to be a "small business" or "small organization" if it has total assets of \$5 million or less on the last day of its most recent fiscal year.<sup>132</sup> In the

<sup>131</sup> 17 CFR 240.0-10(a).

<sup>132</sup> An investment company is a small entity if it, together with other investment companies in the same group of related investment companies, has net assets of \$50 million or less as of the end of its most recent fiscal year. 17 CFR 270.0-10.

<sup>130</sup> 5 U.S.C. 603.