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Corporate & Securities Practice

SEC Extends Emergency Order Relaxing Issuer Repurchase Rule

The Securities and Exchange Commission has extended its emergency order that relaxes the conditions that issuers and affiliated purchasers must meet to qualify for the Rule 10b-18 safe harbor for issuer share repurchases.

Rule 10b-18 protects issuers and affiliated purchasers from liability for manipulation under Section 9(a)(2) of, and Rule 10b-5 under, the Exchange Act *solely* by reason of the manner, timing, price, and volume of their repurchases, but only if the repurchases are made in the market in accordance with the manner, timing, price, and volume conditions set forth in Rule 10b-18. In response to market conditions, the SEC temporarily suspended the time of purchase condition, and increased the volume limitation condition, of Rule 10b-18, through 11:59 EDT on October 17, 2008. See [Release No. 58703](#) (October 1, 2008), which extended the emergency order that the SEC issued in [Release No. 34-58588](#) (September 18, 2008).

While issuers are not required to follow Rule 10b-18 when repurchasing their shares, if they want the protection afforded by this safe harbor, their repurchases on a daily basis must meet all of the conditions of that rule. The emergency orders have suspended the timing condition of paragraphs (b)(2)(i), (b)(2)(ii) and (b)(2)(iii) of Rule 10b-18 that otherwise required that purchases:

- Not be the opening (regular way) purchase reported in the consolidated system;
- Not be effected during the 10 minutes before the scheduled close of the primary trading session in the principal market for the security and the 10 minutes before the scheduled close of the primary trading session in the market where the purchase is effected (*for any security that has an average daily trading value of US\$1 million or more and a public float value of US\$150 million or more*); and
- Not be effected during the 30 minutes before the scheduled close of the primary trading session in the principal market for the security and the 30 minutes before the scheduled close of the primary trading session in the market where the purchase is effected (*for any other security*).

The emergency orders also modified the volume condition of paragraph (b)(4) of Rule 10b-18 so that the limit on the total volume of Rule 10b-18 purchases effected by or for the issuer, and any affiliated purchasers, on any single day is temporarily increased from 25 percent of the average daily trading volume for that security, as reported during the preceding four calendar weeks, to 100 percent of such average daily trading volume.

Only the timing and volume conditions of Rule 10b-18 are modified by the emergency orders. To get the benefit of the Rule 10b-18 safe harbor, issuers and affiliated purchasers must meet all of the other conditions of Rule 10b-18. This includes the manner of sale and the price of purchase conditions set forth in paragraphs (b)(1) and (b)(3) of Rule 10b-18, which remain unchanged. Also, Rule 10b-18 protects issuers

from liability only by reason of the manner, timing, price, and volume of issuer repurchases. Issuers must still determine that they are not purchasing securities while in possession of material non-public information.

If you have any questions about the emergency orders relating to Rule 10b-18, please contact the author of this Alert, [Laura D. Richman](#) (+1 312 701 7304) or any other member of our Corporate & Securities practice.

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