

## SEC Proposes to Modernize Issuer Repurchase “Safe Harbor” Rules

The Securities and Exchange Commission (the “SEC”) has proposed amendments to Rule 10b-18 (the “Rule”) under the Securities Exchange Act of 1934 (the “Exchange Act”), which provides issuers with a “safe harbor” from liability for manipulation when they repurchase their common stock, in accordance with certain manner, timing, price and volume conditions. The proposed amendments are intended to clarify and modernize certain elements of the Rule to account for significant changes in trading strategies and automatic trading systems and technology that have taken place since its initial adoption in 1982.

### Extension of Prohibition of Market Opening Purchases

Under the current Rule, the safe harbor would not be available on days where an issuer’s purchase is the opening (regular way) purchase reported in the consolidated system on that day, but *would* remain available where the issuer’s purchase is the opening purchase in the principal market for its security, and the opening purchase in the market where the purchase is effected, provided there is already an opening purchase reported in the consolidated system that day. The SEC has proposed to modify the Rule to reverse this result such that the safe harbor would not be available under any circumstances on days where the issuer’s purchase is the opening purchase in the principal market for its security, and the opening purchase in the market where the purchase is effected.

### Allowance of VWAP Transactions

Under the current Rule, an issuer may only seek to acquire its security at a price that is no higher than the highest independent bid or last independent transaction price, whichever is higher, quoted or reported in the consolidated system at the time the purchase is effected. This limitation negatively impacts the ability of issuers to make repurchases on a volume-weighted average price (“VWAP”) basis, which the SEC noted has become one of the most widely recognized and accepted pricing mechanisms and trading benchmarks, because VWAP transactions are priced on the basis of individual trades that are executed and reported throughout the trading day.

In order to provide issuers with greater flexibility, the SEC has proposed to amend the current Rule to allow purchases on a VWAP basis as long as the following criteria are met:

- The purchased security has an average daily trading volume (“ADTV”) of \$1 million or more and a public float value of \$150 million or more;
- The purchase must be entered into or matched before the opening of the regular trading session;
- The VWAP execution price is determined based on all regular way trades effected in accordance with the Rule’s timing and price conditions reported in the consolidated system during the primary trading session for the security;
- The purchase does not exceed 10% of the security’s ADTV;
- The purchase is not effected for the purpose of creating actual, or apparent, active trading in or otherwise affecting the price of any security;

- The VWAP must be calculated on the basis of every regular-way trade reported in the consolidated system effected in accordance with the Rule's timing and price conditions; and
- The purchase is reported using a special VWAP trade modifier.

### Partial Relief for Noncompliance Resulting from "Flickering Quotes"

Under the current Rule, the failure to meet any of the manner, timing, price or volume limitations with respect to any of the issuer's purchases during a day will disqualify all of such purchases from the safe harbor for that day. The SEC has proposed to amend the current Rule to provide that where an issuer's purchase order is entered in accordance with the Rule's four conditions but is, immediately thereafter, executed outside of the price condition solely due to flickering quotes, only the noncompliant purchase will be disqualified. While the SEC did not propose to include a definition of "flickering quotes" in the proposed Rule, it noted in the proposing release that they occur "when there are rapid and repeated changes in the current national best bid during the period between identification of the current national best bid and the execution or display of the ... bid or purchase."

### Exclusion of SPACs During Pending Acquisitions

Currently, the Rule excludes from the safe harbor purchases effected during the period from the time of public announcement of a merger, acquisition, or similar transaction involving a recapitalization, until the earlier of the completion of such transaction or the completion of the vote by the target shareholders (the "merger exclusion"). The SEC has proposed to modify the merger exclusion in connection with an acquisition by a special purpose acquisition company ("SPAC") so it extends until the earlier of the completion of such transaction or the completion of the vote by *both* the target shareholders and the SPAC shareholders.

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The full text of the SEC's release proposing the amendments to the Rule is available at: <http://www.sec.gov/rules/proposed/2010/34-61414.pdf>.

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