

SEC Proposes Amendments to Rule 10b-18's Safe Harbor Regarding Issuer Repurchases

The Securities and Exchange Commission ("SEC") issued a release proposing amendments to Rule 10b-18 of the Securities and Exchange Act of 1934 (the "Rule"). Under the Rule, issuers are shielded from liability under Sections 9(a)(2) and 10(b) of the Exchange Act and Rule 10b-5 of the Exchange Act for manipulation; provided, however, that certain conditions are met, such as the manner, timing, price and volume conditions of the repurchase. The SEC stated that the current Rule 10b-18 safe harbor should be modernized to account for significant changes that have occurred in the markets and trading strategies since the adoption of the Rule.

In order to ensure that the Rule comports with the changing markets and trading strategies, the SEC has proposed the following amendments:

- **Timing Condition:** Modify the timing conditions so that Rule 10b-18 repurchases are precluded from being (i) the opening purchase in the principal market for the security and (ii) the opening purchase in the market where the purchase is effected. This is in addition to the current prohibition against the repurchase being the opening purchase reported in the consolidated system.
- **Price Condition:** Provide an exemption from the price condition for Rule 10b-18 purchases effected on a volume-weighted average price ("VWAP") basis; provided, however, that certain conditions are satisfied. While the amendments would allow a VWAP repurchase to be exempt from the price condition of the Rule, all other conditions of Rule 10b-18 must be met in order to utilize the safe harbor.
- **Scope of Safe Harbor - "flickering quotes:"** Limit the Rule's disqualification provisions with respect to instances where an issuer's repurchase order is entered in accordance with the Rule's requirements, but because of "flickering quotes," is subsequently exercised outside of the price condition set forth in the Rule. In the event this occurs, the proposed amendments provide that the non-compliant purchase will be disqualified from the safe harbor but all compliant repurchases will be eligible for the safe harbor. This is in contrast to the current Rule 10b-18, which disqualifies all repurchases for the entire day in the event a non-compliant purchase is made.
- **Scope of Safe Harbor - "merger exclusion:"** Modify the merger exclusion provision of the Rule to extend the time in which the safe harbor is unavailable with respect to an acquisition by a special purpose acquisition company ("SPAC"). Under the proposed amendments, the safe harbor will be unavailable for a SPAC until the SPAC's shareholders complete their vote on the acquisition.

The SEC is requesting public comment on or before March 1, 2010 regarding the proposed amendments.

If you have any questions regarding the proposed amendments or would like to coordinate a comment to the SEC, please contact [John Henry](mailto:jhenry@millermartin.com) at jhenry@millermartin.com, [Clint Cromwell](mailto:ccromwell@millermartin.com) at ccromwell@millermartin.com or any other member of Miller & Martin's [Securities Practice Group](#).

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