Corporate Finance Alert

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Share Repurchases

In recent months, a number of companies have repurchased or announced plans to repurchase their shares. Management and boards of directors overseeing companies with significant cash stockpiles yet finding fewer mechanisms to boost earnings may soon need to decide whether or not a share repurchase is the most productive use of their cash. This alert addresses the questions surrounding share repurchases that companies should consider as they evaluate the advantages, disadvantages, legal implications and strategic considerations of share repurchases.

Overview

What are the ways a company can repurchase its shares?

There are four principal ways a company can repurchase its shares, all of which are discussed below:

(1) open market purchases;

(2) issuer tender offers;

(3) privately-negotiated repurchases; and

(4) structural programs, including accelerated share repurchase programs.

Most share repurchases are effected over time through open market purchases. These are often referred to as share repurchase programs or plans.

Why should a company repurchase its shares?

There are a number of reasons a company might consider repurchasing its shares, including:

- returning capital to shareholders in a more tax-efficient manner than declaring dividends;
- signaling to the market that its shares are undervalued and thus a good investment;
- offsetting the dilutive impact of merger and acquisition activity and exercises of employee stock options; and
- reducing outstanding share count, thereby increasing earnings per share or improving other metrics based on the number of outstanding shares.

A company contemplating a share repurchase should, after consultation with outside counsel and other advisors, ensure that it has the authority to repurchase its shares and confirm whether it is subject to any limitations or restrictions on repurchasing shares. Companies should review:

- relevant law of its state of incorporation, including laws setting forth capital or surplus requirements to repurchase shares. For example, Section 160 of the Delaware

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General Corporation Law prohibits a corporation from purchasing its shares of capital stock when the purchase "would cause any impairment of the capital of the corporation";[1]

- its organizational documents, including its certificate of incorporation and bylaws;
- any agreements that may restrict or limit its ability to repurchase its securities. In particular, credit agreements, indentures, shareholder agreements, call spread transactions and other similar documents and transactions should be reviewed carefully (for example, such agreements may include a restricted payments covenant which limits the repurchase of common shares);[2]
- any applicable requirements imposed by any stock exchange on which its shares are listed;[3] and
- tax and accounting treatment of share repurchases.

In addition, a company may not make any share repurchases (or establish a plan under Rule 10b5-1 to do so in the future (as described below)) at a time when the company possesses material non-public information.

Should a company's board of directors explicitly approve the repurchase before it is implemented?

Yes. Any share repurchase should be authorized and approved by a company's board of directors. Among the factors that the board should consider is the impact of the repurchase on the cash position of the company, the capital needs of the company and whether there is a better alternative use of the company's cash surplus, such as acquisitions or capital expenditures. The board should discuss and document the goal of the repurchase. By doing so, the board can demonstrate that it properly considered its shareholders' best interests and that it properly discharged its fiduciary duties. Furthermore, state laws, the company's constituent documents and agreements, stock exchange rules, and tax and accounting treatment all need to be considered. For example, under Delaware law and the law of other states, directors may have personal liability for an unlawful share repurchase.

Should a company publicly disclose its share repurchase program?

Yes. In order to avoid potential liability for insider trading in connection with a share repurchase program, a company should publicly disclose the program prior to its commencement. Disclosure should be made after consultation with counsel. At a minimum, disclosure should be made with enough time to allow the market to absorb the announcement and include the following information:

- the estimated time period during which the purchases will be made;
- the maximum number of shares proposed to be acquired or the maximum amount of funds to be expended;
- the objective of the acquisition of shares;
- any plan or proposal relating to the disposition of the shares to be purchased; and
- an indication of how the purchases will be made.

The disclosure may be made in a Form 10-Q or 10-K, or by means of a press release or Form 8-K, depending upon timing of the approval and commencement of the program. The company also should issue a public announcement disclosing any material modifications to a share repurchase program.

Is a company subject to any reporting requirements in connection with its repurchase program?

Yes. Item 703 of Regulation S-K requires that, for all issuer repurchases of equity securities (whether an open market or private transaction), the company must disclose in its next periodic report the following information, in tabular form, for each month of the preceding fiscal quarter:[4]

- the total number of shares purchased;
- the average price paid per share;

- the number of shares purchased as part of a publicly announced program; and
- the maximum number of shares (or approximate dollar value) that may yet be repurchased under the program.

Additionally, for publicly announced programs, the SEC requires disclosure (in footnotes to the table) of the following information:

- the date of the announcement;
- the share or dollar amount approved by the board of directors;
- the expiration date (if any) of the program;
- each program that has expired during the last fiscal quarter; and
- each program that the issuer has determined to terminate prior to expiration or under which the issuer does not intend to make further purchases.

Companies generally also include disclosure in the liquidity and capital resource section of their "Management's Discussion and Analysis of Financial Condition and Results of Operations" in their annual and quarterly reports.

Open Market Share Repurchase Programs

What legal issues should a company be aware of as it designs and implements its repurchase program?

Avoiding fraudulent and manipulative practices

Sections 9(a) and 10(b) of the Securities Exchange Act of 1934 (the Exchange Act) prohibit fraudulent and manipulative practices in connection with an issuer's or "affiliated purchaser's"[5] purchase and sale of the issuer's securities.

Rule 10b-18 provides a non-exclusive safe harbor against allegations of market manipulation under Sections 9(a)(2) and 10(b) of the Exchange Act and Rule 10b-5 under the Exchange Act solely by reason of the manner, timing, price and volume of the repurchases when the company's repurchases are made in accordance with the conditions set forth in the rule. Rule 10b-18, however, does not protect against other types of violations of the Exchange Act and Rule 10b-5, such as violations arising from purchases made by an issuer on the basis of material non-public information.

In order to come under Rule 10b-18's safe harbor, a company and its affiliated purchasers, taken together, must meet **all** the following conditions:

1. *Manner*: all of the bids and purchases must be made through only one broker or dealer on any single day;[6]
2. *Timing*: the purchases **must not**:
   (a) constitute the opening transaction,
   (b) for a security that, during the preceding four weeks, has an average daily trading volume (ADTV) value of at least $1 million and a public float value of at least $150 million, be made during the 10 minutes before the scheduled close of the primary trading session in the security's principal market, and during the 10 minutes before the scheduled close of the primary trading session in the market where the purchase is made, and
   (c) for all other securities, be made during the 30 minutes before the scheduled close of the primary trading session in the security's principal market, and the 30 minutes before the scheduled close of the primary trading session in the market where the purchase is made;[7]

3. *Volume*: the aggregate purchases on any given day must not exceed 25 percent of the purchased security's ADTV. "Block"[8] trades typically will be included in computing a security's ADTV. However, once per week, "in lieu of purchasing under the 25 percent of ADTV limit for that day,"[9] a company or its affiliated purchasers may make one block trade of its shares without regard to the volume limit, provided that it does not make any other Rule 10b-18 purchases on the same day. Purchases made pursuant to this block trade exception will not be included in computing a security's ADTV for purposes of Rule 10b-18 volume limits; and

4. *Price*: the purchases must not be made at a price that exceeds the highest independent bid or the last independent transaction price (whichever is higher) quoted or reported in the consolidated system at the time the purchase is made.[10]

The safe harbor applies on a daily basis, and a failure to meet any one of the four conditions will remove all of a company's repurchases from the safe harbor for the day.

Generally, companies attempt to comply with Rule 10b-18. Companies typically enter into an arrangement with a broker or dealer that agrees to implement the repurchase program according to the companies' instructions and in accordance with the requirements of Rule 10b-18. All of the major brokerage firms understand the Rule 10b-18 requirements and implement programs accordingly.

What types of purchases are not protected by Rule 10b-18?

In some instances, a company will not be able to avail itself of Rule 10b-18's safe harbor protection. Repurchases that are made as part of a plan or scheme to evade the federal securities laws, even if made in technical compliance with the rule, are not protected. In addition, the safe harbor does not apply to certain types of repurchases, including: (1) purchases made in a tender offer; (2) purchases effected by or for an employee plan by an agent independent of the issuer; (3) purchases of fractional security interests; or (4) certain purchases during the period starting at the public announcement of a merger, acquisition or similar transaction involving a recapitalization, and ending at the earlier of the completion of such transaction or the vote by target shareholders.[11] The safe harbor also does not apply to the repurchase of any security other than common stock (or an equivalent interest) or purchases made outside the United States.

Should a company designing its repurchase program in accordance with Rule 10b-18 monitor the activities of its affiliated purchasers?

Yes. For purposes of the single broker and volume requirements, the activities of affiliated purchasers will be aggregated with those of the company. It is therefore in a company's best interest to be aware of its affiliated purchasers' activities. Affiliated purchases may include directors and officers of the company, significant shareholders or entities affiliated with significant shareholders.[12] However, the definition of "affiliated purchaser" is nuanced, and a company designing a repurchase program should consult with counsel to identify any potential affiliated purchasers under Rule 10b-18.

Insider trading

Even if a repurchase is made in accordance with Rule 10b-18, a company is not protected against other types of violations of the Exchange Act, such as violations arising from purchases made by the company while in possession of material non-public information.

What steps can a company take in order to avoid liability for insider trading?

A company is the "ultimate" insider and therefore, concerns about purchasing shares while in possession of material non-public information are magnified. If any director, officer or employee of the company is in possession of material, non-public information about the company, the company should not be repurchasing shares. If the company does not possess material non-public information, one step that the company can take in order to protect itself with respect to repurchases in the future is to implement a Rule 10b5-1 trading plan. If the company is repurchasing outside of a Rule 10b5-1 trading plan, it should limit its purchases to open window periods when officers and directors are able to buy and sell securities of the company. In addition, the company also can choose to disclose any material

non-public information prior to any share repurchase if it is in possession of material non-public information at a time when it is seeking to make a share repurchase outside of a Rule 10b5-1 trading plan.

What is a Rule 10b5-1 trading plan?

A company engaged in a share repurchase program can establish a trading plan pursuant to Rule 10b5-1 in order to provide instructions to a broker to effect repurchases at a later date. This plan can be used to establish an affirmative defense to a claim that it was aware of material non-public information when any such repurchases are then effected.

A trading plan must meet the following conditions to comply with Rule 10b5-1:

- *Trading Must be Pre-Established*: the binding contract, trading instruction or written plan must be established at a time when the company is not in possession of material non-public information (it usually is established in a company's "window period");[13]
- *Plan Must Set (or Set Formula for) Trading Criteria*: the binding contract, trading instruction or written plan either sets, or sets a formula for, the amount, price and date of purchases (a Rule 10b5-1 plan typically is not adopted in connection with a single purchase) or delegates those decisions to a broker or dealer (provided the company has no further discretion over those decisions);
- *No Subsequent Discretion as to Amount, Price or Dates of Trades*: the binding contract, trading instruction or written plan does not allow the company, and the company does not have, further influence over how, when or whether to effect purchases. The company does, however, retain the discretion to terminate a Rule 10b5-1 plan;
- *Good Faith*: the plan is entered into, and all instructions thereunder are given, in good faith and not to evade the prohibitions of Rule 10b-5; and
- *Purchase Made Pursuant to Trading Plan*: purchases occur pursuant to the trading plan, such that the company does not alter or deviate from the trading plan or enter into or alter a corresponding or hedging transaction with respect to the securities.

The advantage of a Rule 10b5-1 plan is that it allows a company to continue repurchasing its shares in the open market while in possession of material non-public information. The disadvantage of such a plan is that a company may lose discretion over its repurchases and will be at risk to market changes that may render the plan undesirable. A company can minimize the risks of an "autopilot" plan by limiting the duration, number of shares or amount of money subject to the plan and by taking advantage of its ability to set specified formulas for repurchases that vary depending upon market performance or other factors. In addition, it may be possible to implement "side by side" programs whereby a Rule 10b5-1 plan operates alongside a discretionary plan, allowing the company to take advantage of the ability to purchase during blackout periods provided by Rule 10b5-1 without giving up discretion over purchases during open window periods under the discretionary plan.

Many companies elect to disclose the existence of such plans, or their intention to enter into such a plan to effect some or all of an announced repurchase program. Recently, there has been enhanced scrutiny by the SEC and in the media of potential insider trading violations by corporate executives who relied on Rule 10b5-1 plans to conduct their trades. Although the SEC has not focused on Rule 10b5-1 plans ad-

Rule 10b5-1 Plan Practice Tips

- Plan ahead: don't start thinking about a Rule 10b5-1 plan in the final days of your company's open window.
- Carefully consider plan instructions: Do not assume you can change them, or terminate the plan, if market conditions, or the company's condition, strategy or forecast changes. Frequent modifications to a plan are more likely to invite SEC scrutiny.
- Carefully consider the dates established for transactions. Regular transactions over an extended period are preferable to a small number of large transactions.
- Consider a "cooling off" period before any transactions under the Rule 10b5-1 plan will occur.
- Do not enter into a Rule 10b5-1 plan at a time when the company possesses material non-public information, or with the benefit of hindsight, may well be viewed as possessing material non-public information.

opted by companies in connection with a share repurchase program, companies must take care when adopting or modifying such plans.

Regulation M

How does Regulation M impact a company's share repurchase program?

Regulation M restricts the behavior of a company, its selling shareholders, offering participants and the company's affiliated purchasers during a "distribution" of securities. Those parties, with certain exceptions, are prohibited from bidding for, purchasing or attempting to induce any person to bid for or purchase, any security that is the subject of a "distribution." The parties are bound by Regulation M for the applicable restricted period which commences either one or five trading days before pricing (depending on trading volume and public float) and continues until the completion of the distribution. Therefore, a company that intends to undertake a distribution of securities will need to suspend a repurchase program to comply with Regulation M. If the company is using a 10b5-1 plan, the plan can be written to automatically suspend purchases during the relevant restricted period.

What types of transactions may qualify as "distributions" under Regulation M?

A "distribution" is defined in Rule 100 of Regulation M as "an offering of securities, whether or not subject to registration under the Securities Act, that is distinguished from ordinary trading transactions by the magnitude of the offering and the presence of special selling efforts and selling methods." A "distribution" under Regulation M may include public equity offerings, at-the-market offerings, forced conversions of securities, private offerings, tender offers, exchange offers, offerings of convertible or exchangeable securities and mergers involving the issuance of shares of stock.

Because the definition of "distribution" under Regulation M is complex, a company should consult counsel to determine whether it is engaged in a "distribution" before proceeding with, and during the pendency of, a share repurchase program.

Issuer Tender Offers

Some companies may elect to make a tender offer to repurchase their shares. However, most company share repurchases are effected over a period of time through open market purchases and try to avoid being characterized as a tender offer since companies undertaking tender offers are subject to significant disclosure and substantial procedural requirements under Rule 13e-4 of the Exchange Act. Issuer tender offers may be structured as a "fixed price" tender offer or a "Dutch auction" tender offer in which the company offers to repurchase a fixed maximum number of shares within an identified range of prices. A company may consider doing a tender offer in order to repurchase a large number of shares at one time without being subject to the volume limitations under Rule 10b-18.

What constitutes a "tender offer"?

The term "tender offer" is not defined in the U.S. securities law, and there is no bright-line test to determine what constitutes a "tender offer." Neither the SEC nor Congress has defined the term, however several courts have adopted an eight-factor standard initially proposed by the SEC. The courts consistently have ruled that the determination of a tender offer is a fact-based determination. Thus, depending on a company's particular circumstances, the presence or absence of one or more of the following factors will not be dispositive, and one or more of the following factors may be more determinative than the others:

1. an active and widespread solicitation of shareholders;
2. solicitation of a substantial percentage of the issuer's shares;
3. the offer to purchase is made at a premium over the market price;
4. the terms of the offer are firm rather than negotiable;

5. the offer is contingent on the tender of a fixed minimum number of shares, often subject to a fixed maximum number to be purchased;
6. the offer is open only for a limited period of time;
7. the offerees are subject to pressure to sell their shares; and
8. public announcements of a repurchase program come before or accompany rapid accumulation of large amounts of the company's securities.

Will a share repurchase program that complies with Rule 10b-18 constitute a tender offer?

Typically, no. A share repurchase program that complies with Rule 10b-18 should not constitute a tender offer because the purchases are made at the prevailing market price and without any solicitation of shareholders. Programs that do not take advantage of the safe harbor will need to be constructed carefully and monitored to avoid triggering any tender offer concerns.

What is required of a company contemplating a tender offer?

A company's tender offer must comply with significant disclosure and substantive requirements under Rule 13e-4 of the Exchange Act and additional restrictions, including:

- the offer must remain open for at least 20 business days following commencement;
- the offer must remain open for at least 10 business days following any increase or decrease in the offering price or in the percentage of securities sought;
- the offer must be made to all holders, and all tendering shareholders must receive the highest price paid for any share tendered in the offer;
- the offer must permit tendered securities to be withdrawn as long as the offer is open and, if not yet accepted for payment, after the expiration of 40 business days from commencement;
- if less than all tendered securities are to be purchased, then the issuer generally must purchase from tendering security holders *pro rata*, based upon the number of securities tendered by each such holder; and
- before the company may repurchase any other shares, there is a cooling-off period of 10 business days after the closing of the tender offer.

Companies making a tender offer are required to file with the SEC a tender offer statement on Schedule TO and amendments to the Schedule TO to report any material changes and the final results of the tender offer. In addition, the company must file all written communications it or its affiliates make relating to the tender offer.

What is a "going private" transaction and what are the implications of a "going private" transaction?

The purchase of any equity security by a company or its affiliated purchasers, if the purchase is intended to or is reasonably likely to cause, either directly or indirectly, the company's common stock to be either (1) held by fewer than 300 persons (based on record holders, not beneficial holders), or (2) no longer listed on an exchange or quoted on an inter-dealer quotation system, is considered a "going private" transaction and subject to Rule 13e-3 of the Exchange Act. If a company's program constitutes a "going private" transaction it will be subject to significant additional timing and disclosure requirements under Rule 13e-3, including disclosure relating to the fairness of the transaction. A company's repurchase program that is designed to adhere to Rule 10b-18's restrictions typically will not constitute a "going private" transaction.

Privately-Negotiated Repurchases

A privately-negotiated share repurchase is another means for a company to repurchase its shares. Rather than repurchase its shares on an exchange or in the over-the-counter market (*i.e*, an open market repurchase), a company may decide to enter into share purchase agreements with individual shareholders.

What are the benefits of privately-negotiated repurchases and how are they implemented?

Companies may consider entering into one or more privately-negotiated repurchases to effect a share repurchase as they can provide a company a means to repurchase a sizable amount of its shares quickly. However, as the number of shareholders that are approached increases, companies may face significant administration expenses as well as potential illegal tender offer concerns. As a result, privately negotiated repurchases typically are limited to a few sellers. Like all share repurchase programs, privately negotiated transactions also are subject to Rule 10b-5's prohibitions on repurchases made while in possession of material non-public information. Often the sellers provide representations and warranties about, among other things, their financial sophistication and knowledge about the company. Sellers also may waive certain claims against a company in connection with a sale.[14]

Are privately-negotiated repurchases covered by the Rule 10b-18 safe harbor?

No. In a no-action letter, the SEC declared that privately-negotiated repurchases are not eligible for the Rule 10b-18 safe harbor[15], noting that privately negotiated purchases typically present little potential for manipulative practices and therefore do not require the protection of the safe harbor. Even though a company effectuating a privately-negotiated repurchase may not avail itself of the rule's safe harbor, it must nevertheless consider the applicability of the Exchange Act's general anti-fraud and anti-manipulation provisions. Helpfully, shares repurchased pursuant to a privately-negotiated repurchase are not computed into a company's daily volume limitation, so a company may privately repurchase shares while also engaged in repurchases on the open market.

Accelerated Share Repurchase Programs

An "accelerated share repurchase" program (ASR), also known as an "accelerated share buy-back" (ASB), is another method companies employ to repurchase their shares. In a typical ASR, the company enters into a "forward" contract with an investment bank at the inception of the program. At that time, the company typically makes an upfront payment to the bank, and the bank borrows the company's shares in the market from existing shareholders and delivers those shares to the company. The bank satisfies its obligation to return the borrowed shares by purchasing shares in the open market during a pre-agreed period of time. Typically, the company receives additional shares at the end of that period although depending on the stock performance and the initial delivery of shares, the company may be obligated to return some of the shares to the bank, or pay cash instead.

An ASR allows a company to retire the shares when delivered, with a substantial percentage delivered (and retired) at the inception of the transaction. Often the programs provide companies with the ability to repurchase shares at a discount to the trading price of the shares during the term of the program. ASRs also can be tailored to meet a particular company's risk appetite by incorporating additional features, such as collars, caps and knock-out days, all of which can be used to limit the company's exposure to future increases in stock price.

While purchases made pursuant to an ASR do not fall within the Rule 10b-18 safe harbor, in practice ASR agreements are structured to meet many of the rules' requirements. ASR programs are also typically structured as 10b5-1 plans, which provide the benefits of those plans, but also limit the company's flexibility in controlling the repurchases.

Conclusion

Many companies face and will continue to face important choices regarding how best to allocate their surplus cash. An increasing number have chosen to repurchase shares of their stock. It is important for a company to weigh the legal considerations surrounding share repurchases discussed in this alert

so that it can make an informed decision. If a company elects to implement a repurchase program, it should take great care to ensure that the individuals tasked with implementing the program understand the applicable legal (and any contractual) restrictions and requirements, and that the necessary processes are in place to ensure compliance.

END NOTES

1 A Delaware corporation generally will not be deemed to have impaired its capital if, following the share repurchase, the value of its assets exceeds its liabilities by an amount at least equal to its "stated capital." A corporation's stated capital often is equal to the aggregate par value of all outstanding shares. The amount by which net assets exceeds stated capital is referred to as "surplus." A "revaluation" of assets and liabilities to reflect fair value — a technique known as "revaluation surplus" — often is utilized by companies seeking to repurchase shares when the historical financial statements do not reflect the availability of adequate surplus.

2 A close review of the company's debt agreements will be important in connection with any potential share repurchase program. In addition to any explicit prohibitions or limitations contained in any debt agreement, the company also must consider the negative effects of the repurchase on any of the financial ratios that potentially could be triggered inadvertently by a share repurchase.

3 Stock exchanges rules regarding advance notice of material corporate developments and other filings may apply.

4 Reporting foreign private issuers are required to report their repurchases pursuant to Item 15(e) of Form 20-F, and closed-end management investment companies that are registered under the Investment Company Act of 1940 must report their repurchasing activity pursuant to Item 8 of Form N-CSR. 17 C.F.R. § 240.10b-18.

5 Under Rule 10b-18, a person or entity is an "affiliated purchaser" if it: (1) acts, directly or indirectly, in concert with the issuer with the intent to acquire the issuer's securities; or (2) is "an affiliate who, directly or indirectly, controls the issuer's purchases of such securities, whose purchases are controlled by the issuer, or whose purchases are under common control with those of the issuer."

6 Rule 10b-18(b)(1) states that the "one broker or dealer" requirement will not apply to purchases that were not solicited by or on behalf of a company or its affiliated purchasers. The rule also requires that, in the event Rule 10b-18 purchases are made by or on behalf of more than one affiliated purchaser (or a company and one or more of its affiliated purchasers) on a single day, the issuing company and its affiliated purchasers must use the same broker or dealer. Moreover, where Rule 10b-18 purchases are made on a company's behalf by a broker-dealer that is not an electronic communication network (ECN) or other alternative trading system (ATS), that broker-dealer is permitted to access ECN or other ATS liquidity in order to execute repurchases on behalf of the company (or any affiliated purchaser) on that day. Rule 10b-18(b)(1).

7 However, repurchases may be made after the close of the primary trading session until the end of the period in which last sale prices are reported in the consolidated system, as long as such purchases (1) satisfy the rule's requirements and (2) are made at prices that do not exceed the lower of the closing price of the primary trading session in the security's principal market and any lower bids or sale prices subsequently reported in the consolidated system. During this period, the one broker or dealer requirement still applies, but a company is permitted to make Rule 10b-18 purchases using a different broker or dealer from the one used during the primary trading session. However, the company's purchase may not be the opening transaction of the session following the close of the primary trading session. Rule 10b-18(b)(2).

8 "Block" trades are defined by Rule 10b-18(a)(5) to include: (1) purchases of at least $200,000; or (2) purchases of at least 5,000 shares that have a purchase price of at least $50,000; or (3) purchases of at least 20 round lots of a security where the purchased quantity represents 150 percent or more of the trading volume for that security (if trading volume data is available), and, if trading volume data is not available, at least 20 round lots of the security that total at least .001 percent of the outstanding shares of the security, exclusive of any shares owned by an affiliate.

9 Rule 10b-18(b)(4).

10 In the event that a security's transaction prices are not quoted or reported in the consolidated system, Rule 10b-18(b)(3) requires that purchases of the security not exceed the highest independent bid or the last independent transaction price, whichever is higher, displayed on any national securities exchange or any inter-dealer quotation system that displays at least two priced quotations for the security, at the time the purchase is made. For all other securities, purchases made under the rule must not exceed the highest bid obtained from three independent dealers. Rule 10b-18(b)(4).

11 The merger exclusion does not apply when (1) the purchase price is solely cash and there is no valuation period with respect to the purchase price or (2)(A) the repurchases made on any single day do not exceed the lesser of 25 percent of the security's four-week ADTV or the issuer's average daily Rule 10b-18 purchases during the three full calendar months preceding the announcement of the transaction; or (B) the repurchases are block purchases that do not exceed the average size and frequency of the company's "block" purchases during the three full calendar months preceding the announcement of the transaction. Rule 10b-18(a)(13).

12 Under Rule 10b-18 the issuing company's corporate officers or directors are not affiliated purchasers simply because they participated in the decision to authorize a Rule 10b-18 program, although they may still otherwise qualify. Furthermore, the target company of an acquiror may be deemed an affiliated purchaser with respect to purchases of the acquirors' securities after signing a merger agreement. SEC Staff Legal Bulletin No. 9, Oct. 27, 1999.

13 There is no specific rule regarding the amount of time, if any, in advance a company must adopt a Rule 10b5-1 plan before it can make its first repurchase. While a longer "cooling off" period (for instance, 30 days) is recommended, some companies choose to begin their purchases within days of adopting a Rule 10b5-1 trading plan.

14 Selling shareholders may waive their claims against the company in a negotiated agreement that is colloquially referred to as a "big boy letter" (although the relevant provisions could be included in the purchase agreement related to the sale). In the context of a share repurchase, a big boy letter is an agreement in which the company and a selling shareholder acknowledge that the company may possess material, non-public information which it has not disclosed, and they agree to enter into the transaction regardless of the information disparity and the seller agrees to waive any claims related to this information disparity. Big boy letters have received significant attention because while they can aid parties in allocating risk, the case law is mixed on whether they are enforceable in a private action or whether they constitute a violation of Section 29(a) of the Exchange Act, which states, "any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or any rule or regulation thereunder, or of any rule of a self-regulatory organization, shall be void." Regardless of a big boy letter's enforceability in a private action, the SEC has taken the position that a big boy letter will not preclude an SEC enforcement action.

15 SEC No-action letter, *General Electric Co.* (August 3, 1984).

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