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Rule 10b–18 and Purchases of Certain Equity Securities by the Issuer and Others; Proposed Rule

SECURITIES AND EXCHANGE COMMISSION

17 CFR Parts 228, 229, 240, and 274

[Release Nos. 33–8160; 34–46980; IC–25845; File No. S7–50–02]

RIN 3235–AH37

Rule 10b–18 and Purchases of Certain Equity Securities by the Issuer and Others

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (Commission) is proposing amendments to its rule that provides issuers with a ''safe harbor'' from liability for manipulation when they repurchase their common stock in the market in accordance with the rule's manner, timing, price, and volume conditions. The proposed amendments are intended to simplify and update the safe harbor provisions in light of market developments since the rule's adoption. To enhance the transparency of issuer repurchases, the Commission also is proposing amendments to a number of regulations and forms that would require disclosure of all issuer repurchases (open market and private transactions), regardless of whether the repurchases are effected in accordance with the safe harbor rule.

DATES: Comments must be received on or before February 18, 2003.

ADDRESSES: Persons wishing to submit written comments should send three copies to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments also may be submitted electronically at the following e-mail address: *rule-comments@sec.gov*. All comment letters should refer to File No. S7–50–02. Comments submitted by e-mail should include this file number in the subject line. Comment letters received will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. Electronically submitted comment letters will be posted on the Commission's Internet web site (*http://www.sec.gov*). To help us process your comments more efficiently, comments should be sent by one method only. The Commission does not edit personal, identifying information, such as names or e-mail addresses, from electronic submissions. Submit only the information you wish to make publicly available.

FOR FURTHER INFORMATION CONTACT: James Brigagliano, Assistant Director, Joan Collopy, Special Counsel, or Elizabeth Sandoe, Special Counsel, Office of Risk Management and Control, Division of Market Regulation, at (202) 942–0772, or, with respect to the proposed disclosure amendments, David Lee, Special Counsel, Office of Chief Counsel, Division of Corporation Finance, at (202) 942–2900, or, John Faust, Attorney Adviser, Office of Disclosure Regulation, Division of Investment Management, at (202) 942–0721, at the Securities Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549.

SUPPLEMENTARY INFORMATION: The Commission is requesting public comment on proposed amendments to Rule 10b–18 (the safe harbor rule for issuer repurchases) [17 CFR 240.10b–18] under the Securities Exchange Act of 1934 (Exchange Act). The Commission also is requesting comment on proposed disclosure amendments to Regulations S–K and S–B [17 CFR 229.703 and 228.703] under the Exchange Act, Exchange Act Forms 10–Q [17 CFR 249.308a], 10–QSB [17 CFR 249.308b], 10–K [17 CFR 249.310], 10–KSB [17 CFR 310b], 20–F [17 CFR 249.220f], and proposed Form N–CSR under the Exchange Act and the Investment Company Act of 1940 (Investment Company Act) [17 CFR 249.331 and 274.128].

I. Introduction

Issuers repurchase their securities for many legitimate business reasons.[1] For example, issuers may repurchase their stock in order to have shares available for dividend reinvestment, stock option and employee stock ownership plans, or to reduce the outstanding capital stock following the cash sale of operating divisions or subsidiaries. Issuers may believe that a repurchase program is preferable to paying dividends as a way of returning capital to shareholders. Issuer repurchases also provide liquidity in the marketplace, which benefits all shareholders.

At the same time, an issuer has a strong interest in the market performance of its securities. Among other things, its securities may be the consideration in an acquisition, or serve as collateral for financing. The market price also determines the price of offerings of additional securities. Therefore, at various times, the issuer may have an incentive to manipulate the price of its securities. One way to positively affect the price is to purchase the securities in the open market. Because repurchases of its securities could affect the market price of an issuer's stock, this may expose the issuer to claims that the repurchases were made in a manipulative manner even when they were done in a manner not intended to move market prices.

Rule 10b–18 addresses this problem. In 1982, the Commission adopted Rule 10b–18,[2] which provides issuers [3] with a safe harbor from liability for manipulation under Sections 9(a)(2) and 10(b) of the Exchange Act, and Rule 10b–5 under the Exchange Act, when they repurchase their common stock in the market in accordance with the rule's manner, timing, price, and volume conditions.[4] Rule 10b–18's safe harbor conditions are designed to minimize the market impact of the issuer's repurchases, thereby allowing the market to establish a security's price based on independent market forces without undue influence by the issuer.[5]

Although the safe harbor conditions are intended to offer issuers guidance

[1] Securities Exchange Act Release No. 19244 (Nov. 17, 1982), 47 FR 53333, 53334 (Nov. 26, 1982) (1982 Adopting Release). *See also* Clifford P. Stephens and Michael S. Weisbach, ''Actual Share Reacquisitions in Open-Market Repurchase Programs,'' *Journal of Finance,* February 1998 (observing that firms increase their repurchasing depending on the degree of perceived undervaluation of its stock and on expected cash flow).

[2] 1982 Adopting Release, *supra* note 1. Since 1967, the Commission has considered on several occasions the issue of whether to regulate an issuer's market repurchases of its own securities. The Commission first proposed Rule 10b–10 to govern issuer repurchases in connection with proposed legislation that became the Williams Act Amendments of 1968. Pub. L. No. 90–439, 82 Stat. 454 (July 29, 1968), reprinted in Hearings on S. 510 before Senate Committee on Banking and Currency, 90th Cong., 1st Sess. 214–216 (1967). The Commission then published for public comment proposed Rule 13e–2 in 1970, 1973, and 1980. Rule 13e–2, which was later withdrawn with the adoption of Rule 10b–18, would have been a prescriptive rule with mandatory disclosure requirements, substantive purchasing limitations, and general anti-fraud liability. Securities Exchange Act Release Nos. 8930 (July 13, 1970), 35 FR 11410 (July 16, 1970); 10539 (Dec. 6, 1973), 38 FR 34341 (Dec. 13, 1973); and 17222 (Oct. 17, 1980), 45 FR 70890 (Oct. 27, 1980) (1980 Proposing Release).

[3] The safe harbor is also available for ''affiliated purchasers'' of the issuer. In this Release, the term ''issuer'' includes affiliated purchasers.

[4] In other words, an issuer will not be deemed to have violated Section 9(a)(2) of the Exchange Act or Rule 10b–5 under the Exchange Act, solely by reason of the timing, price, volume, or manner of its repurchases, if the repurchases are made within the limitations of the rule. However, some repurchase activity that meets the safe harbor conditions may still violate the anti-fraud provisions of the Exchange Act. For example, as the Commission noted in 1982 when adopting Rule 10b–18, ''Rule 10b–18 confers no immunity from possible Rule 10b–5 liability where the issuer engages in repurchases while in possession of favorable, material nonpublic information concerning its securities.'' 1982 Adopting Release, *supra* note 1, at 47 FR 53333.

[5] *Id.*

when repurchasing their securities in the open market, Rule 10b–18 is not the exclusive means of making non-manipulative issuer repurchases. As the Rule states, there is no presumption that purchases outside of the safe harbor violate Sections 9(a)(2) or 10(b) of the Exchange Act or Rule 10b–5 under the Exchange Act.[6] Given the widely varying characteristics in the market for the stock of different issuers, it is possible for issuer repurchases to be made outside of the safe harbor conditions and not be manipulative. Nevertheless, we understand that issuers generally are reluctant to undertake any repurchases without the certainty that their repurchases come within the Rule's safe harbor.

Based on our experience with the operation of Rule 10b–18 and to reflect market developments since the Rule's adoption, we propose to revise Rule 10b–18 as described below. Our proposals would allow issuers whose securities are less susceptible to manipulation to stay in the market longer and to repurchase a greater number of shares during periods of severe market decline. At the same time, our proposals to modify the volume and price provisions are intended to maintain reasonable limits on the safe harbor while furthering the objectives of the Rule. Moreover, the proposed amendments to Regulations S–K and S–B, Forms 10–Q, 10–QSB, 10–K, 10–KSB, 20–F, and proposed Form N–CSR seek to enhance the transparency of issuer repurchases.[7] Our proposals also are intended to continue to allow issuer repurchases (under conditions that are unlikely to create manipulative effects on the issuer's security's price or market activity) without imposing undue restrictions on the operation of issuer repurchases or undermining the economic benefit such purchases provide investors, issuers, and the marketplace.

[6] *See* 17 CFR 240.10b–18(d). Moreover, the safe harbor is not intended to define the appropriate limits to be observed by those persons not covered by the safe harbor nor the appropriate limits to be observed when purchasing securities other than common stock.

[7] Regulations S–K and S–B set forth the standard filing instructions for forms under the Securities Act and the Exchange Act. Forms 10–K (KSB) and 20–F are filed by issuers (small business issuers) and foreign private issuers respectively to satisfy annual reporting obligations and Form 10–Q (QSB) is filed by issuers (small business issuers) to satisfy quarterly reporting obligations. Proposed Form N–CSR would be used by registered management investment companies to file certified shareholder reports with the Commission under the Sarbanes-Oxley Act of 2002. *See* Investment Company Act Release No. 25723 (August 30, 2002) [67 FR 57298 (September 9, 2002)]; Sarbanes-Oxley Act of 2002, Pub. L. No. 107–204, 116 Stat. 745 (2002).

II. Overview of Current Rule 10b–18

A. Scope of the Rule

Rule 10b–18 applies to bids for and purchases of an issuer's common stock by or for an issuer.[8] Purchases of any other type of security are not covered. Because Rule 10b–18 assumes normal market conditions, the definition of the term ''Rule 10b–18 purchase'' excludes issuer bids and purchases made during certain corporate events, for example, mergers, tender offers, and distributions that involve the issuer.[9] The safe harbor also does not confer absolute protection from all liability for purchases (*e.g.*, purchases that are part of a plan or scheme to evade the federal securities laws)—even if made in technical compliance with the Rule.[10] Rather, the safe harbor provides only that certain, specific provisions of the securities laws will not be considered to have been violated solely by reason of the manner, timing, price, or volume of such repurchases, provided the repurchases are made within the limitations of the Rule.

B. Conditions of the Rule

Rule 10b–18 provides a safe harbor for purchases on a given day. To come within the safe harbor for that day, an issuer must satisfy the Rule's *manner*, *timing*, *price*, and *volume* conditions when purchasing its own common stock in the market.[11] Failure to meet any one of the four conditions will disqualify the issuer's purchases from the safe harbor for that day.

1. Manner of Purchase Condition

The manner of purchase condition requires an issuer to use a single broker or dealer per day to bid for or purchase its common stock. This requirement is intended to avoid the appearance of widespread trading in a security that could result if the issuer uses many brokers or dealers to repurchase its stock.[12] The ''single broker or dealer'' condition, however, applies only to Rule 10b–18 purchases that are ''solicited'' by or on behalf of the issuer. Accordingly, the issuer may purchase shares from more than one broker-dealer if the issuer does not solicit the transactions. An issuer must evaluate whether a transaction is ''solicited'' by or on behalf of an issuer, depending on the facts and circumstances of each case.[13]

Moreover, where an issuer engages a single coordinating broker-dealer to make its Rule 10b–18 purchases, the broker-dealer can make (consistent with the single broker or dealer condition) appropriate and customary arrangements with other broker-dealers, including exchange specialists and ''two-dollar'' brokers on exchange floors, to execute repurchases.[14]

2. Timing Condition

The timing condition restricts the periods during which the issuer may bid for or purchase its common stock. This condition excludes from the safe harbor purchases at the opening and during the last half hour of trading because market activity at such times is considered to be a significant indicator of the direction of trading, the strength of demand, and the current market value of the security.[15] Therefore, where there is no independent opening transaction on a given trading day, the issuer is precluded from making purchases under the safe harbor for that day.

3. Price Condition

The price condition specifies the highest price an issuer may bid or pay for its common stock.[16] Rule 10b–18's current price limitations vary depending on whether the security is a reported, exchange-traded, Nasdaq, or other security, and whether the bid or purchase is effected on an exchange.[17] The price condition is intended to prevent the issuer from leading the market for the security through its repurchases by limiting the issuer to bidding for or buying its security at a price that is no higher than the highest independent published bid or last independent transaction price. As such, the price condition uses an *independent* reference price that has not been set or

[8] 17 CFR 240.10b–18(a)(3).

[9] 17 CFR 240.10b–18(a)(3)(i)–(vii). Because these transactions involve valuation periods for the issuer's security, they also present a greater incentive for the issuer to manipulate its stock price. Moreover, most of these non-covered transactions are regulated under other rules (*e.g.,* Exchange Act Rules 13e–1 and 13e–4 concerning tender offers, and Rule 102 of Regulation M regarding purchases during a distribution of the issuer's stock).

[10] *See* note 4, *supra.*

[11] 17 CFR 240.10b–18(b)(1)–(4).

[12] 1980 Proposing Release, *supra* note 2, 45 FR at 70891.

[13] Although Rule 10b–18 does not define ''solicitation,'' we would not consider the issuer's disclosure and announcement of a repurchase program alone as necessarily causing a subsequent purchase to be deemed ''solicited'' by or on behalf on an issuer. *See* 1982 Adopting Release, *supra* note 1, 47 FR at 53337.

[14] *See* 1980 Proposing Release, *supra* note 2, 45 FR at 70898.

[15] 17 CFR 240.10b–18(b)(2). The prohibition of Rule 10b–18 bids and purchases near the close of trading is to prevent the issuer from creating or sustaining a high bid or transaction price at or near the close of trading.

[16] 17 CFR 240.10b–18(b)(3)

[17] *Id.*

influenced by the issuer but, instead, is based on independent market forces.

4. Volume Condition

The volume condition limits the amount of securities an issuer may repurchase in the market in a single day. The volume condition is designed to prevent an issuer from dominating the market for its securities through substantial purchasing activity.[18] An issuer dominating the market for its securities in this way can mislead investors about the integrity of the securities market as an independent pricing mechanism.[19]

Under the current volume condition, an issuer may effect daily purchases in an amount up to 25 percent of the average daily trading volume in its shares (the ''25% volume limitation'').[20] However, the volume limitation does not include an issuer's block purchases. Moreover, an issuer's block purchases are not included in determining a security's average daily trading volume (ADTV).[21] The Rule defines a ''block'' as a quantity of stock that either: (i) Has a purchase price of $200,000 or more; or (ii) is at least 5,000 shares and has a purchase price of at least $50,000; or (iii) is at least 20 round lots of the security and totals 150 percent or more of the trading volume for that security or, in the event that trading volume data are unavailable, is at least 20 round lots of the security and totals at least one-tenth of one percent (.001) of the outstanding shares of the security, exclusive of any shares owned by any affiliate.[22]

The definition further provides that a block does not include any amount a broker or dealer, acting for its own account, has accumulated for the purpose of selling to the issuer or affiliated purchaser, if the issuer knows or has reason to know that such amount was accumulated for such purpose. The definition also excludes any amount that a broker or dealer has sold short to the issuer, if the issuer knows or has reason to know that the sale was a short sale.[23]

III. Proposed Amendments to Rule 10b–18

In this release, we are proposing broad revisions to the safe harbor rule. In particular, we propose to:

- Modify the definition of a ''Rule 10b–18 purchase'' to incorporate the current ''Rule 10b–18 bid'' definition and to clarify the scope of the safe harbor;
- Modify the timing condition by applying an ADTV value and public float value test to determine when an issuer must be out of the market before the scheduled close of trading in order to qualify for the safe harbor;
- Apply a uniform price condition that limits issuers to purchasing their securities at a price that is no higher than the highest independent bid[24] or the last independent transaction price,[25] whichever is higher, quoted or reported in the consolidated system;[26]
- Modify the volume condition's treatment of block purchases by including block purchases in calculating a security's ADTV and the 25% volume limitation;
- Modify the volume condition by allowing issuers to purchase up to a daily aggregate amount of 500 shares, as an alternative to the 25% volume limitation; and
- Apply an alternative volume condition (applicable only in the trading session immediately following a market-wide trading suspension), which would increase the 25% volume limitation to 100%.

In addition, we are proposing to amend Regulations S–K and S–B, and Forms 10–Q, 10–QSB, 10–K, 10–KSB, 20–F under the Exchange Act, and proposed Form N–CSR under the Exchange Act and the Investment Company Act, to require disclosure of all issuer repurchases (open market and private transactions) of equity securities, regardless of whether the repurchases are effected in accordance with Rule 10b–18. New Item 703 of Regulations S–K and S–B and new Item 15(e) would require issuers to disclose in their Forms 10–Q (10–QSB), 10–K (10–KSB), and 20–F the total number of shares (or units) purchased for the previous quarter, the average price paid per share, the identity of broker-dealer(s) used to effect the purchases (except in the case of Form 20–F), the number of shares (or units) purchased as part of a publicly announced plan or program, and the maximum number (or approximate dollar value) of shares (or units) that may yet be purchased under the plans or programs. New Item 6 of proposed Form N–CSR would require closed-end management investment companies that are registered under the Investment Company Act (''closed-end funds'') to provide similar disclosure.[27]

We solicit comment on our approach and the specific proposals. We also encourage commenters to present data in support of their positions.

A. Amendments Concerning the Scope of the Safe Harbor

1. Eligible Securities

Under the proposal, the safe harbor would continue to apply to bids for and purchases of an issuer's common stock by or for an issuer. Specifically, the proposal would amend the definition of a ''Rule 10b–18 purchase'' to include any ''bid or limit order that would effect such purchase'' and to codify the staff's position that the safe harbor is available for repurchases of all common equity

[18] 1980 Proposing Release, *supra* note 2, 45 FR 70890.

[19] *Id.* A market can be manipulated even in the absence of price leadership. Following the market closely with purcahses or bids essentially places a floor underneath the market at each independent purchase or bid. This may exhaust the available supply of securities that may be offered at that price, which ultimately forces others to raise their bids. *See* L. Loss and J. Seligman, *Securities Regulation, 3d Edition,* at 10–E–10 (1999); Kidder, Peabody & Co., 18 SEC 559, 570 (1945); *Halsey, Stuart & Co., Inc.,* 30 SEC 106, 129 (1949) (describing over-the-counter (''OTC'') manipulation).

[20] This applies to reported securities, exchange-traded securities, and Nasdaq securities. 17 CFR 240.10b–18(b)(4). For any other security (*e.g.*, OTC Bulletin Board (''OTCBB'') and Pink Sheet securities), volume of purchases on a single day may not exceed one round lot or, on that day plus the preceding five business days, 1/20th of one percent (0.0005) of outstanding shares of the security. *Id.* Trading volume is defined generally as the average daily trading volume reported to the consolidated transaction reporting system or to the NASD for the security in the four calendar weeks preceding the week that the Rule 10b–18 purchase or bid is to be effected. 17 CFR 240.10b–18(a)(11).

[21] 17 CFR 240.10b–18(b)(4). Although the rule's current volume condition does not apply to block purchases, an issuer must satisfy the other three conditions in order for the block purchases to come within the safe harbor.

[22] 17 CFR 240.10b–18(a)(14).

[23] *Id.*

[24] Proposed Rule 10b–18(a)(6) would define ''highest independent bid'' to mean ''the highest published bid for a regular way trade (other than a bid by or for the issuer or any affiliated purchaser of the issuer) at the time the Rule 10b–18 purchase is effected.''

[25] Proposed Rule 10b–18(a)(7) would define ''last independent transaction price'' as ''the price at which the last regular way trade (other than a trade by or for the issuer or any affiliated purchaser of the issuer) was reported at the time the Rule 10b–18 purchase is effected.''

[26] For purposes of Rule 10b–18's timing and price conditions, proposed Rule 10b–18(a)(5) would define ''consolidated system'' to mean ''a consolidated transaction (or quotation) reporting system that collects and publicly disseminates on a current and continuous basis transaction (or quotation) information in equity securities pursuant to an effective transaction reporting plan (as defined in 17 CFR 240.11Aa3–1), the rules of a national securities exchange, or the rules of a national securities association.''

[27] *See* Sections 4(3) and 5(a)(2) of the Investment Company Act [15 U.S.C. 80a–4(3) and 80a–5(a)(2)] (defining ''management company'' and ''closed-end company''). Section 23(c) of, and Rules 23c–1, –2, and –3 under, the Investment Company Act also apply to closed-end fund repurchases of their own securities. Because the shares of closed-end funds frequently trade at a discount to net asset value (NAV), historically, closed-end funds have sometimes engaged in issuer repurchases in an attempt to reduce the discount.

securities (*i.e.*, an issuer's common stock or an equivalent interest, including a unit of beneficial interest in a trust or limited partnership or a depository share).[28] However, the Rule 10b–18 safe harbor would continue not to apply to any other type of security—even if related to the common stock (*e.g.*, warrants, options, or security futures products that are physically-settled). The proposal would also amend the definition of a ''Rule 10b–18 purchase'' to make it clear that the exception for purchases effected pursuant to a merger includes purchases effected ''during the period from the time of public announcement of the merger, acquisition, or similar transaction, until the completion of such transaction.'' [29] Once a merger or acquisition is announced, an issuer has considerable incentive to support or raise the price of its stock. Thus, the safe harbor should not apply to purchases made during this period.

Q. Should the safe harbor be made available to securities other than common equity, such as preferred stock, warrants, rights, convertible debt securities, options, or security futures products? If the safe harbor were to include such securities, what price, volume, and time of purchase conditions should apply? We seek specific comment concerning the potential for manipulative abuse that transactions in such securities may present.

Q. Should the safe harbor continue to apply to less liquid, less transparent securities (*e.g.*, OTCBB and Pink Sheet securities)? If so, should the price, volume, and time of purchase conditions be modified in order to minimize the risk of manipulation by an issuer making market repurchases in these less liquid, less transparent securities? If so, how? For example, should these securities be subject to a more restrictive volume limitation? Please provide specific examples.

Q. Should the Rule require than an issuer have current financial disclosures as a prerequisite to receiving the protection of the safe harbor? For example, should it be available to companies that do not make public filings of financial information, or are not current in required filings?

Q. Should the safe harbor apply to an issuer's repurchases of its common stock effected outside of the United States (*e.g.*, on foreign exchanges)? If so, how should the safe harbor conditions apply to such purchases (*e.g.*, should a security's ADTV include *worldwide* trading volume)?

Q. Should the safe harbor only be available outside of the United States to foreign private issuers, or to foreign companies whose principal market is outside the United States? If so, are there certain conditions of Rule 10b–18 that should be modified or that should not apply at all with respect to purchases outside the United States and, if so, why?

Q. Are there different conditions under Rule 10b–18 that should apply with respect to purchases outside the United States and, if so, why are those conditions more appropriate than the conditions currently proposed for Rule 10b–18?

Q. Should the merger exception to the definition of a ''Rule 10b–18 purchase'' include purchases effected after the time of the shareholder vote and/or the end of the valuation period? We seek specific comment concerning the potential for manipulative abuse that transactions during this period may present.

2. Purchases by or for Issuers and Affiliated Purchasers

Under the Proposal, the safe harbor would continue to apply to Rule 10b–18 purchases made by an ''affiliated purchaser'' of the issuer. The current Rule defines an affiliated purchaser of the issuer as a person acting, directly or indirectly, in concert [30] with the issuer for the purpose of acquiring the issuer's securities, and any affiliate [31] that, directly or indirectly, controls the issuer's Rule 10b–18 purchases, or whose purchases are controlled by, or are under common control with, those of the issuer.[32] Under the current Rule, the term ''affiliated purchaser'' does not include a broker, dealer, or other person solely by his effecting Rule 10b–18 purchases on behalf of the issuer (and for its account), or an officer or director of the issuer solely by his participating in the decision to authorize the issuer to effect Rule 10b–18 purchases.

Q. Does the current definition of ''affiliated purchaser'' provide the proper scope or are there other persons that should be covered by or excluded from the safe harbor? For example, should the current definition of ''affiliated purchaser'' be revised to have the same meaning as contained in § 242.100 of Regulation M under the Exchange Act?

B. Amendments to the Purchasing Conditions

1. Manner of Rule 10b–18 Purchases

We are not proposing to amend the single broker or dealer condition. This condition would continue to require an issuer to use a single broker or dealer per day to bid for or purchase its common stock. Purchases by or on behalf of several affiliated purchasers of the issuer, or the issuer and at least one affiliated purchaser, would continue to be subject to the one broker or dealer condition (*i.e.*, requiring the issuer and any of its affiliated purchasers to use the same broker-dealer on any single day in effecting Rule 10b–18 purchases). The Proposal also would retain the exception for purchases that are not solicited by or made on behalf of the issuer (*i.e.*, such purchases could continue to be made from or through several brokers or dealers on a single day).[33]

Q. The Commission seeks specific comment concerning whether the single broker or dealer condition needs to be amended in order to accommodate issuer repurchases effected through ATSs (*i.e.*, which are registered as broker-dealers) or on electronic communication networks (ECNs)? If so, in what way should the condition be modified?

2. Time of Purchases

We propose to modify Rule 10b–18's timing condition by using an ADTV value and public float value test to determine the time when an issuer must be out of the market before the scheduled close of trading in order to qualify for the safe harbor. Currently, an issuer's purchase may not be the opening transaction reported to the

[28] Proposed Rule 10b–18(a)(13). Rule 10b–18 currently defines ''Rule 10b–18 purchase'' as ''a purchase of common stock of an issuer by or for an issuer or any affiliated purchaser of the issuer.'' 17 CFR 240.10b–18(a)(3). The current rule separately defines ''Rule 10b–18 bid'' as a bid for securities that, if accepted, or a limit order that, if executed, would result in a Rule 10b–18 purchase. 17 CFR 240.10b–18(a)(4). The definition of ''common equity'' for purposes of Rule 10b–18 is similar to that in Rule 405 under the Securities Act.

[29] Proposed Rule 10b–18(a)(13)(iv). This would include during any period where the market price of a security will be a factor in determining the consideration to be paid pursuant to a merger, acquisition, or similar transaction.

[30] 17 CFR 240.10b–18(a)(2)(i). The ''acting in concert'' standard includes persons acting with the issuer in purchasing the issuer's securities, regardless of whether the purchases are made for the account of the issuer itself. 1980 Proposing Release, *supra* note 2, 45 FR at 70895, n. 30. The proposal would amend the language of the ''acting in concert'' standard to include the words ''directly or indirectly'' in order to be consistent with the ''acting in concert'' standard in Rule 100 of Regulation M (17 CFR 242.100).

[31] ''Affiliate'' is defined to mean any person that directly or indirectly controls, is controlled by, or is under common control with, the issuer. 17 CFR 240.10b–18(a)(1).

[32] 17 CFR 240.10b–18(a)(2)(ii).

[33] 17 CFR 240.10b–18(b)(1)(i). 1982 Adopting Release, *supra* note 1, 47 FR at 53337. *See* also discussion in Section II.B.1 and text accompanying note 13 *supra.*

consolidated system, nor may the issuer purchase during the last half hour before the scheduled close of trading in the principal market (including during the last half hour before the scheduled close of trading on the exchange on which the purchase is to be made) or the last half-hour before termination of the period in which last sale prices are reported to the consolidated system (whichever is applicable).[34] These limitations apply regardless of a security's trading characteristics (*e.g.*, liquidity or daily trading volume).[35]

The proposed amendments would continue to limit an issuer from effecting a Rule 10b–18 purchase as the opening transaction for the day.[36] However, limitations on purchases at the close would vary (*i.e.*, either 10 to 30 minutes before the scheduled close of trading) depending on the security's ADTV value and public float value (as defined in 17 CFR 242.100). The timing modifications are designed to reflect the relative liquidity of the security and, therefore, the likelihood of an issuer affecting the closing price.[37] As such, the proposed modifications recognize that the current Rule's last half-hour restriction may be unnecessarily long to prevent issuers of highly liquid securities from influencing market prices and volume near the close of trading. At the same time, the proposed modifications would continue to provide a clear standard whereby issuers and their affiliates would know when they must be out of the market in order to qualify for the safe harbor.[38]

The proposed modifications to the timing condition would work as follows: To qualify for the safe harbor, issuers of more liquid securities (*i.e.*, those having an ADTV value of $1 million or more and a public float value of $150 million or more),[39] could not bid for or purchase their securities during any of the following periods: (1) In the ten minutes before the scheduled close of the primary (regular) trading session in the principal market for the security, (2) the ten minutes before the scheduled close of the primary (regular) trading session in the market where the purchase is made, or (3) after the termination of the period in which last sale prices are reported in the consolidated system (*i.e.*, after the consolidated tape stops running). Thus, the proposed modification would allow issuers of more actively traded securities, which are less susceptible to manipulation, to stay in the market longer.

Issuers of all other eligible securities (*i.e.*, those having an ADTV value of less than $1 million or a public float value of less than $150 million) could not bid for or purchase their securities during any of the following periods: (1) The 30 minutes before the scheduled close of the primary (regular) trading session in the principal market for the security, (2) the 30 minutes before the scheduled close of the primary (regular) trading session in the market where the purchase is made, or (3) after the termination of the period in which last sale prices are reported in the consolidated system (*i.e.*, after the consolidated tape stops running).[40]

Q. Should eligibility for the modified timing limitation (*i.e.*, 10 minutes before the scheduled close of trading) be based on a security's ADTV and an issuer's public float? Do the proposed ADTV and public float levels need to be raised (or lowered)? Are there alternative tests we should consider?

Q. Do the proposed timing limitations for issuer bids and purchases near the scheduled close of trading adequately protect against an issuer affecting the closing price?

Q. Should the Rule's timing limitations be modified to allow issuers of more liquid securities (*i.e.*, those having an ADTV value of $1 million or more and public float value of $150 million or more) to effect a Rule 10b–18 purchase as the opening (first) transaction?

3. Price of Purchases

Rule 10b–18's current price limitations vary depending on the market for the security.[41] We propose to apply a uniform price condition that limits issuers to purchasing their securities at a purchase price that does not exceed the highest independent bid or the last independent transaction price, whichever is higher, quoted or reported in the consolidated system (*i.e.*, regardless of where the securities are traded).[42] For securities that are not quoted or reported in the consolidated system, the proposed Rule provides that an issuer's Rule 10b–18 purchases must be effected at a purchase price that does not exceed the highest independent bid or the last independent transaction price, whichever is higher, displayed and disseminated on any national securities exchange or on any inter-dealer quotation system (as defined in Exchange Act Rule 15c2–11) that displays at least two priced quotations for the security. For all other securities, Rule 10b–18 purchases must be effected at a price no higher than the highest independent bid obtained from three dealers.

We are considering whether to eliminate the ''last independent transaction price'' alternative (*i.e.*, and have only the ''bid test''). We are concerned that permitting purchases at

[34] Under the current version of Rule 10b–18(b)(2), ''other'' securities (*i.e.,* securities that do not meet the definition of ''reported securities'' under the rule) do not have timing restrictions under the safe harbor. At this time, we are not proposing to change this.

[35] 17 CFR 240.10b–18(b)(2)(i)–(iii).

[36] Specifically, proposed Rule 10b–18(b)(2) would prohibit a Rule 10b–18 purchase from being the first (opening) regular way purchase reported in the consolidated system.

[37] One concern is that the issuer may attempt to ''mark the close'' (*i.e.*, determine the final transaction price reported in the market). *See* 1980 Proposing Release, *supra* note 2, 45 FR at 70899. The Commission has brought several marking the close cases. See, *e.g.*, *S.E.C.* v. *Schiffer*, 1998 U.S. Dist. LEXIS 8579, Fed. Sec. L. Rep. (CCH) p. 90247 (S.D.N.Y. 1998) (issuer orchestrated over several months purchases effected at or shortly before the close of trading in order to increase the issuer's stock price); *Thomas C. Kocherhans*, Securities Exchange Act Rel. No. 36556 (Dec. 6, 1995), 60 SEC Docket 2589; *Myron S. Levin*, Securities Exchange Act Rel. No. 31124 (Sept. 1, 1992); *S.E.C.* v. *John G. Broumas,* Civil Action No. 91–2449 (D.D.C.), Litigation Rel. No. 12999 (Sept. 27, 1991).

[38] *See* proposed Rule 10b–18(b)(2). This means that an issuer may not purchase in *any* market during the specified periods.

[39] Proposed Rule 10b–18(b)(2)(ii)(A). The proposed timing amendment would incorporate Regulation M's standards and methods of calculating ADTV and public float value. Under Regulation M, issuers with a security that has an ADTV value of $1 million or more and a public float value of $150 million or more are excluded from Rule 101 of Regulation M under its ''actively–traded securities'' exception. See 17 CFR 242.101(c)(1). The Commission selected $150 million for the public float value test because it believes that the securities of issuers with a public float value at or above this threshold, and that also have an ADTV value of at least $1 million, have a sufficient market presence to make them less likely to be manipulated. See Securities Exchange Act Release No. 38067 (December 20, 1996), 62 FR 520. Moreover, the public float value test is intended in part to exclude issuers from the ''actively-traded securities'' exception where a high trading volume level is an aberration. Id.

In calculating the dollar value of ADTV, any reasonable and verifiable method may be used. For example, it may be derived from multiplying the number of shares by the price in each trade, or from multiplying each day's total volume of shares by the closing price on that day. Public float value (*i.e.*, the aggregate market value of common equity securities held by non-affiliates of the issuer) is to be determined in the manner set forth on the front page of Form 10–K, even if the issuer of such securities is not required to file Form 10–K. For reporting issuers, the public float value should be taken from the issuer's most recent Form 10–K or based upon more recent information made available by the issuer.

[40] Proposed Rule 10–18(b)(2)(ii)(B) & (C).

[41] 17 CFR 240.10b–18(b)(3).

[42] Proposed Rule 10b–18(b)(3). *See also* notes 24–26, *supra*. The proposed amendments would simplify and update the rule by removing the outdated definitions and price provisions that depend on whether the security is a ''reported security,'' ''exchange traded security,'' ''Nasdaq security,'' or ''other security'' and whether the bid or purchase is effected on an exchange.

the last independent transaction price may allow issuers to create a floor for their security on the offer side of the market. Specifically, issuers could reach across the market to buy at the offer side, which could cause the price of their securities to move up to higher price levels—especially if done as block-size trades—or could allow issuers to purchase their stock at ''stale'' transaction prices (*e.g.*, in a declining market where the bid has moved down). Such activities would undermine the objectives of Rule 10b–18 by allowing the issuer to influence the market, thereby making the market less reliable for investors.

Q. We seek specific comment concerning whether the current ''last independent transaction price'' alternative should be eliminated.

Q. Please provide specific examples of transactions where eliminating the ''last independent transaction price'' alternative would significantly limit an issuer's ability to purchase its securities within the safe harbor.

Q. Has the conversion to decimal pricing, particularly where a one-cent minimum price variation could result in frequent quote changes (so-called ''quote flickering''), made the Rule's ''bid test'' difficult to satisfy? Has decimal pricing similarly affected use of the ''last independent transaction price'' alternative (*e.g.*, if transaction rates substantially increase)? Please provide specific examples concerning the impact of decimalization with respect to the Rule's price condition, including specific suggestions to address these concerns.

Q. Should Rule 10b–18's price condition be based on prices quoted or reported for the security in the ''consolidated system'' as we propose, or should the price condition be based solely on prices reported (or quoted) in the ''principal market'' for the security?

Q. Should Rule 10b–18's price condition apply where the issuer or its affiliated purchaser has no control, directly or indirectly, over the price at which a Rule 10b–18 purchase will be effected, for example, automated trading systems that utilize ''passive'' (independently-derived) pricing, such as the volume weighted average price (VWAP) or the mid-point of the NBBO? Please provide specific examples of transactions where modifying the Rule's price condition would be appropriate. We also seek comment concerning the potential for manipulative abuse that permitting such transactions may present.

4. Riskless Principal Transactions

Rule 10b–18 covers purchases of an issuer's common stock made by or for the issuer.[43] We understand that some broker-dealers purchase shares through their market making desks when working an issuer order to repurchase shares. These shares are then sold in ''riskless principal'' transactions to the issuer.[44]

Riskless principal transactions raise the issue of how to apply the safe harbor to the two ''legs'' of the transaction: the broker-dealer's purchase in the market for its own account; and the issuer's purchase of the shares from the broker-dealer. The issuer and the broker-dealer (buying on behalf of the issuer), may seek to claim the protection of the safe harbor for both legs of the transaction.[45] This appears to contemplate one transaction by which the issuer effects its purchase, and which will result in one reported trade.

Q. How should Rule 10b–18 apply to issuer purchases from a broker-dealer engaged in a riskless principal transaction? If riskless principal trades should be eligible for the safe harbor, is it appropriate to limit the Rule's application to riskless principal trades where both legs are transacted at the same price and only one leg is reported to the market?[46]

5. Volume of Purchases

We propose to modify the volume condition's treatment of block purchases. Under the current volume condition, an issuer may effect daily purchases in an amount up to 25% of the ADTV in its shares. Block purchases by an issuer, however, are not subject to the 25% volume limitation, nor are the shares purchased by the issuer in block transactions included when calculating a security's ADTV. Because market conditions no longer appear to justify excluding block purchases from the volume limitation, the proposed amendments would eliminate the special treatment of block purchases. To qualify for the safe harbor, therefore, issuers would have to include block purchases in applying the 25% volume limitation. However, issuers would be able to include their block purchases in calculating the ADTV for the security, thereby increasing the amount of stock that some issuers would be able to purchase within the safe harbor.[47]

When Rule 10b–18 was adopted, block purchases were conducted less frequently than today. The Commission viewed the market impact of block purchases as being less than that of a series of smaller purchases that, in the aggregate, are equal in size to a block but are accomplished over a period of time and so could give the impression to the market of multiple investment decisions to buy and more likely affect the market price.[48] As such, it appeared to be reasonable to exclude blocks from the volume limitation.

Since the Rule's adoption, however, the frequency of block purchases has significantly increased. Today, block purchases comprise a substantial portion of trades on the exchanges and Nasdaq.[49] The size of a block purchase under Rule 10b–18 (*e.g.*, 5,000 or more shares) is also substantially lower than that used by the exchanges or Nasdaq (*e.g.*, 10,000 or more shares). This suggests that block purchases under Rule 10b–18 account for an even greater percentage of the overall trading in these markets.[50] Moreover, because

[43] *See* 17 CFR 240.10b–18(a)(3).

[44] A ''riskless principal'' purchase transaction is one in which the broker-dealer has a buyer for the shares before he purchases shares as principal from the seller, and contemporaneously resells the shares to the buyer.

[45] Under the NASD's trade-reporting rules, for certain riskless principal trades, the broker-dealer reports only one leg of the transaction (*i.e.,* the first leg of the transaction when the broker-dealer purchases the shares in the open market, rather than the offsetting transaction to the buyer) to ACT. In order to qualify for riskless principal trade reporting, the trades must be executed at the ''same price'' (exclusive of a markup or markdown, commission equivalent, or other fee). *See* Securities Exchange Act Release No. 41208 (March 24, 1999), 64 FR 15386 (March 31, 1999), NASD Notice to Members 99–65 (March 1999) and NASD Notice to Members 00–79 (November 2000).

[46] *See* NASD Rules 4632(d)(3)(B), 4642(d)(3)(B), and 6620(d)(3)(B).

[47] Some issuers have noted that the utility of effecting purchases in blocks (and thereby avoiding the 25% volume limitation) is largely deiminished by the inability to include such block purchases in calculatiing a security's four weeks' trading volume. *See, e.g.,* Letter regardinig Rule 10b–18: Interpretation of ''Trading Volume'' (October 21, 1991). Issuers also have noted the practical difficulty and burden of recording all block purchases and subtracting them from the security's overall trading volume, to calculate trading volume under the Rule.

We understand that the 25% volume limitation generally does not present a problem for the higher float issuers with large repurchase programs (*i.e.*, these issuers do not have substantial need for the block exception). However, even with the availability of a block exception, the 25% volume limitation is problematic for issuers with lower float, because it is harder for smaller issuers to execute block trades.

[48] *See* 1980 Proposing Release, *supra* note 2, 45 FR 17222.

[49] For example, block trades (which the NYSE defines as a trade of 10,000 shares or greater) accounted for approximately 50% of the total trading volume on the NYSE in 2001. *See NYSE Factbook—2001 Data*, at p. 99.

[50] In contrast to Rule 10b–18's definition of ''block'' (which is defined as the purchase of: (a) a quantity of stock that has a purchase price of $200,000 or more; or (b) at least 5,000 shares of stock that has a purchase price of $50,000 or more),

Continued

there is no limit on the number of block purchases an issuer can make on a single day, the block exception essentially allows issuers to avoid any volume limitation simply by effecting their Rule 10b–18 purchases in block size.[51] Thus, the block exception may allow issuers to dominate the market for their securities in a way not originally contemplated by the safe harbor. This raises the possibility that investors could be misled about the integrity of the securities trading market as an independent pricing mechanism.[52] As a result, the block exception essentially negates the volume limitation (and undermines its purpose) for many securities.[53]

Issuers also currently may attempt to take advantage of the block exception to facilitate corporate transactions. For example, in contested takeovers, bidders may purchase significant blocks of their securities, thus raising their share price and widening the spread between their offer and that of their competitors.[54] Accordingly, we would propose that block size transactions be treated as any other purchase under the Rule.

The proposed amendments would continue to limit Rule 10b–18 purchases to 25% of the ADTV for the security per day.[55] However, in contrast to the Rule's current ADTV calculation (which is based on the average daily trading volume for the security for the four calendar weeks preceding the week in which the Rule 10b–18 bid or purchase is to be made, excluding issuer block purchases during that period), the proposed amendments would define ADTV as the average daily trading volume, *including* block purchases made by or on behalf of the issuer, reported for the security during the four calendar weeks preceding the week in which the Rule 10b–18 purchase is effected.[56] Including issuer block-size purchases in the ADTV calculation would increase many issuers' volume limit. It also would substantially reduce the burden and potential error associated with issuers' having to subtract out their block-size purchases when calculating ADTV, as is required under the current Rule.

In addition, we would propose to modify the volume condition to allow issuers to purchase up to a daily aggregate amount of 500 shares, as an alternative to the 25% volume limitation. Thus, under the proposed amendments, an issuer's Rule 10b–18 purchases, on any single day, may not exceed the higher of 25 percent of the ADTV for that security or a daily aggregate amount of 500 shares.[57] This would increase the amount that issuers of thinly traded securities could repurchase under the safe harbor.

Q. Does the current four calendar-week period provide a sufficient length of time to measure a security's ADTV, or should an alternative period be used (for example, two full calendar months, or 60-day rolling period)?

Q. Should we retain the current block transaction exception, but raise the amount of shares constituting a block (for example, use the NYSE's definition)?

Q. We encourage commenters to submit data regarding what percentage of individual issuer repurchase trading volume over the past five years has been effected through block purchases. In particular, the Commission requests data and analysis on what effect eliminating the block exception would have had on such issuer's repurchasing activity during that period.

Q. Is a volume limitation based on an ADTV calculation feasible with respect to Rule 10b–18 purchases of thinly traded securities? Should we raise (or lower) the volume limit for these securities? Should the proposed 500 shares alternative (to the 25% volume limitation) be increased (or decreased)? Please provide specific examples of where modifying the Rule's volume condition (with respect to these securities) would be appropriate. We also seek comment concerning the potential for manipulative abuse that such transactions may present.

Q. Should the safe harbor be available for issuer repurchases involving security futures or option contracts (including the receipt or purchase for delivery of securities underlying such contracts)? Should the number of shares underlying an option or security futures contract (or other derivative security) entered into by an issuer count against an issuer's 25% daily volume limitation? What effect, if any, should taking delivery of common stock pursuant to a security futures contract or upon exercise of an option have regarding the Rule's other conditions (*e.g.*, price, timing, and manner of purchase) with respect to the availability of the safe harbor for purchases effected in accordance with Rule 10b–18?

IV. After-Hours Trading

A. Applicability of the Safe Harbor During After-Hours Trading Sessions

Since the adoption of Rule 10b–18, the opportunity for investors to trade securities after the markets' regular trading sessions (''after-hours trading'') has increased. To date, the Division has interpreted Rule 10b–18 to be available to purchases effected during limited off-hours trading (OHT) sessions at the primary market's closing price.[58] Specifically, the Division interpreted Rule 10b–18's ''one-half hour before the scheduled close of trading'' language to

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both the NYSE and the NASD define ''block'' purchases in terms of the following criteria: (a) the purchase of a quantity of stock that has a purchase price of $500,000 or more; or (b) the purchase of at least 10,000 shares of stock with a purchase price of $200,000 or more. The AMEX defines a block as 10,000 or more shares. Moreover, we understand that the average size of a block purchase on the NYSE is 24,735 shares. Thus, a purchase satisfying the definition of a ''block'' under Rule 10b–18 is extremely small by current market standards.

[51] Under the current rule, an issuer may purchase up to the 25% volume limitation, and, in addition, may purchase one or more blocks, as defined. *See* 1982 Adopting Release, *supra* note 1. *See also* L. Loss and J. Seligman, *Securities Regulation, 3d Edition*, at 10–E–10 (1999) (noting that ''[g]iven the exception of blocks from the volume limitation, this [25% volume limitation] restriction can be illusory''). It is important to note that, under the current rule, the term ''block'' does not include any amount of securities that a broker or dealer, acting as principal, has accumulated for the purpose of selling to the issuer, if the issuer knows or has reason to know that such amount was accumulated for such purpose. Rule 10b–18(a)(14).

[52] Economic studies have shown that block trades effected in the normal course of trading can affect a security's price. *See, e.g.*, Robert W. Holthausen, *et al.*, ''Large-Block Transactions, the Speed of Response, and Temporary and Permanent Stock-price Effects,'' 26 *Journal of Financial Economics* 71–95 (1990) (presenting evidence of a permanent price effect that increases with block size, whether the block is ''buyer-initiated'' [*i.e.*, blocks that trade on an uptick] or seller-initiated'' [*i.e.*, blocks that trade on a downtick]); Jonathan R. Macey, *et al.*, ''Symposium on the Regulation of Secondary Trading Markets: Program Trading, Volatility, Portfolio Insurance, and the Role of Specialists and Market Makers'' 74 *Cornell L. Rev.* 799, at 819 (July 1989) (stating that empirical evidence confirms that block transactions do affect stock prices); Robert W. Holthausen, *et al.*, ''The Effect of Large Block Transactions on Security Prices: A Cross-Sectional Analysis,'' 19 *Journal of Financial Economics* 237 (1987) (finding that for buyer-initiated transactions [*i.e.*, blocks that trade on an uptick], a permanent price effect results that increases with block size).

[53] *See, e.g.*, The October 1987 Market Break: A Report by the Division of Market Regulation, U.S. Securities and Exhange Commission (February 1988) (The October 1987 Market Break) at p. 6:11 (noting that the treatment of blocks under the rule may effectively negate the volume restriction for many securities).

[54] As discussed above, the proposal would also amend the definition of a ''Rule 10b–18 purchase'' to make it clear that the exclusion of purchases made ''pursuant to a merger, acquisition, or similar transaction involving a recapitalization'' under the current definition, includes purchases effected ''during the period from the time of public announcement of the merger * * * until the completion of such transaction.''

[55] Proposed Rule 10b–18(b)(4).

[56] Rule 10b–18 would continue to include only U.S. market trading volume data in calculating a security's ADTV.

[57] Proposed Rule 10b–18(b)(4).

[58] For example, both the New York Stock Exchange, Inc. (NYSE) and the American Stock Exchange provide crossing sessions in which matching buy and sell orders can be executed at 5:00 p.m. at the exchanges' 4:00 p.m. closing prices.

refer to an exchange's primary trading session (*i.e.*, 9:30–4 p.m. price discovery auction session), rather than OHT trading sessions.[59] As such, Rule 10b–18 safe harbor would be available for Rule 10b–18 purchases effected during these limited OHT sessions (*e.g.*, the NYSE's Crossing Session I), provided that all the Rule's conditions are satisfied.[60]

We are not proposing any amendments to Rule 10b–18 to address after-hours trading. Comment is requested about the need for rulemaking or guidance in this area.

Q. Should the Rule 10b–18 safe harbor be available to issuer purchases effected in after-hours trading sessions?

Q. Should the safe harbor be available only if the after-hours trades are reported on a ''real-time'' basis, *e.g.*, to the consolidated tape?

Q. Do issuer repurchases made in after-hours trading sessions present a greater potential for manipulation?

Q. Should the safe harbor conditions be applied separately to each session or should they carry over from the regular trading session for that day? Should any of the present safe harbor conditions be further modified (*e.g.*, should the volume in an issuer's security in an after-hours trading session be included in calculating the issuer's volume limitation for that day)?

B. Guzman & Company Petition for Rulemaking

On May 21, 1999, Guzman & Company, a registered broker-dealer, filed a petition for rulemaking, requesting that the Commission amend Rule 10b–18 to apply to after-hours trading.[61] Specifically, Guzman & Company seeks the amendment of Rule 10b–18's timing and pricing conditions to permit an issuer or an affiliated purchaser of an issuer to effect purchases or make bids during ''after-hours'' trading sessions subject to the present conditions but with the additional proviso that trades and bids must be at prices lower than the last reported price on the primary exchange or market on which the security of the issuer is traded. The petition also seeks an amendment of the single broker or dealer condition to permit an issuer or an affiliated purchaser of an issuer to utilize a different broker or dealer for ''after-hours'' Rule 10b–18 purchases or bids than is used for Rule 10b–18 purchases or bids during normal trading hours.

Q. We seek specific comment concerning Guzman & Company's proposals.

V. Rule 10b–18 Alternative Conditions

A. Proposed Amendment to Rule 10b–18 Alternative Conditions

On September 23, 1999, we adopted an amendment to the safe harbor conditions in order to facilitate liquidity in the trading session following a market-wide trading suspension, or circuit breaker.[62] Specifically, we modified the timing condition to include in the safe harbor issuer purchases made at the reopening and during the last half-hour prior to the scheduled close of trading or at the next day's opening if a market-wide trading suspension was in effect at the scheduled close of trading.[63] During such trading session, all other Rule 10b–18 conditions apply to issuer purchases.

In view of the extreme market volatility that would trigger a circuit breaker and the desirability of facilitating liquidity in that context, we propose to further modify the safe harbor alternative conditions (which are applicable only in the trading session immediately after a market-wide trading suspension) by increasing the current 25% volume limitation to 100% of the ADTV for that security.[64] The proposed volume modification would permit issuers to purchase more securities within the safe harbor during these rare periods of severe market decline.[65]

Q. Following a market-wide trading suspension, could sufficient liquidity be facilitated by increasing the volume limitation to something less than 100%? If so, what level is appropriate? Should the level be greater than 100%?

Q. Should Rule 10b–18's ''alternative conditions'' be further modified during periods of severe market decline? For example, do Rule 10b–18's pricing or manner conditions need to be modified during such periods or does the definition ''market-wide trading suspension'' need to be expanded to cover additional situations? If so, please provide specific suggestions.

B. NYSE Petition for Rulemaking

On June 13, 2001, the NYSE filed a petition for rulemaking, which seeks an amendment to Rule 10b–18 to make the Rule 10b-18 ''safe harbor'' available to an issuer for a category of ''special purchases'' effected by an independent trustee during a period of unusual volatility in the issuer's stock.[66] Specifically, the NYSE seeks the amendment of Rule 10b–18 to include in the Rule's safe harbor a new category of ''special purchases'' that:

(i) Are effected by a trustee that is not in any control or affiliate relationship with the issuer, and, once instructed by the issuer to conduct the ''special purchase'' program, makes all decisions with respect to the program independent of any influence or control by the issuer (''independent trustee'');

(ii) Are effected on a day when NYSE Rule 80B is put into effect, or, with respect to an individual stock, the price of such stock has declined by $2 or more (in the case of a security whose previous closing price on the NYSE was under $10), the lesser of twenty percent or $5 (in the case of a security whose previous closing price on the NYSE was between $10 and $99.99), or $10 (in the case of a security whose previous closing price on the NYSE was $100 or more); and

(iii) Are limited in volume to no more than a quantity of stock having a market value that does not exceed one-half of one percent of the average market value of the issuer's stock during the four calendar weeks preceding the week in which the ''special purchase'' is made.

The NYSE petitions that ''special purchases'' be subject to the price and single broker or dealer provisions of Rule 10b–18, but that such purchases should be allowed to be effected for the remainder of the trading day. The NYSE also asks that, if a regular Rule 10b–18 program were being conducted by an issuer on a day that a ''special

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[59] *See* Letter Regarding Operation of Off-Hours Trading (OHT) Sessions by the NYSE (June 13, 1991); Letter Regarding Operation of OHT Session by the AMEX (August 5, 1991); and Letter Regarding AMEX After-Hours Trading Facility (May 6, 1997) (the ''OHT Session letters''.

[60] *Id.*

[61] Guzman & Company's Petition for Rule-Making (filed on May 21, 1999) is publicly available in File No. 4–424 in the Commission's Public Reference Room.

[62] Securities Exchange Act Release No. 41905 (September 23, 1999), 64 FR 52428 (September 29, 1999).

[63] 17 CFR 240.10b–18(c).

[64] Proposed Rule 10b–18(c)(5). *See, e.g.*, Comment letters, on the 1999 amendment to Rule 10b–18, from Morgan Stanley & Co. (December 10, 1998) (urging us to eliminate the current volume limitation during the period following a market-wide trading suspension condition or, as an alternative, increase the current 25% volume limitation), and Intel Corporation (December 1, 1998) (suggesting we amend the present volume condition to permit additional issuer repurchases, based on either a higher or scaled percentage, following a severe market break). Both letters are available for public inspection in the Commission's Public Reference Room, Public File No. S7–27–98. *See* also text accompanying note 79, *infra*, regarding the Commission's emergency orders where the volume limitation was temporarily increased from 25% to 100% of a security's ADTV following the events of September 11, 2001.

[65] *See generally* The October 1987 Market Break, *supra* note 53, at pp. 6:1–6:15 (noting the increase in trading volume and the impact of issuer repurchases following the October 1987 market break).

[66] The NYSE's Petition for Rule-Making is publicly available in File No. 4–446 in the Commission's Public Reference Room.

purchase'' is to be effected, Rule 10b–18 be amended to provide that:

(i) The regular Rule 10b–18 program must be cancelled before the ''special purchase'' program can begin;

(ii) The ''single broker or dealer'' requirement applies separately to the regular program and the ''special purchase'' program; and

(iii) Any securities acquired in the regular Rule 10b–18 program would not be included in the new volume limitation applicable to the ''special purchase'' program.[67]

Q. Should Rule 10b–18's ''alternative conditions'' apply where there is a significant decline in the market price of an *individual* stock (*i.e.*, in the absence of a market-wide trading suspension), as suggested by the NYSE in its petition? If so, what conditions should apply to these purchases? Please provide specific examples of where modifying the Rule's ''alternative conditions'' would be appropriate.

Q. We seek specific comment concerning the NYSE's petition for rulemaking, including the feasibility of monitoring compliance with such a program (*i.e.*, especially in cases where there is a severe market decline in the price of an individual stock).

VI. Disclosure

We propose that Regulations S–K and S–B, and Forms 10–Q, 10–QSB, 10–K, 10–KSB, 20–F, and proposed Form N–CSR be amended to require periodic disclosure of all issuer repurchases of shares or other units of any class of the issuer's equity securities that is registered by the issuer pursuant to Section 12 of the Exchange Act.[68] This disclosure requirement would be independent of the Rule 10b–18 safe harbor.

Under the proposal, an issuer would be required to disclose information concerning its repurchases in a new table in its Forms 10–Q/10–QSB (new Item 2(b)), 10–K/10–KSB (new Item 5(c)), 20–F (new Item 15(e)), and, for registered closed-end funds, proposed Form N–CSR.[69] The table in Forms 10–K/10–KSB, 10–Q/10–QSB, and proposed Form N–CSR would include disclosure of all issuer repurchases of its Section 12 registered equity securities (both open market and private transactions) for that quarter (or, in the case of closed-end funds, semi-annual period), including the total number of shares (or units) purchased (reported on a rolling-month basis), the average price paid per share, the identity of any broker-dealer(s) used to effect the purchases, the number of shares (or units) purchased as part of a publicly announced repurchase plan or program, and the maximum number (or approximate dollar value) of shares (or units) that may yet be purchased under the plans or programs.[70]

New Item 15(e) to Form 20–F would require the same tabular presentation of information, with the exception of the identity of the broker-dealer effecting the transactions, which would not be required in the table included in Form 20–F. Thus, a foreign private issuer that has securities registered under Section 12 of the Exchange Act would be required to disclose on a yearly basis in its annual report on Form 20–F its repurchases of its securities. The disclosure provided should relate to the issuer's securities in ordinary share form, whether the issuer has repurchased the shares themselves or depositary receipts that represent the shares. The price data and other data should be based on the currency used in the issuer's primary financial statements.

We also propose footnote disclosure of the principal terms of publicly announced repurchase plans or programs, including (1) the date of announcement, (2) the share or dollar amount approved, (3) the expiration date (if any) of the plans or programs, (4) each plan or program that has expired during the period covered by the table, (5) each plan or program that the issuer has determined to terminate prior to expiration, and (6) each plan or program that the issuer has not purchased under during the period covered by the table and whether the issuer still intends to purchase under that plan or program.

The table also would have to include footnotes that briefly disclose the nature of the transaction for purchases made other than pursuant to a publicly announced repurchase plan or program. These would include, for example, open market and privately negotiated purchases, issuer tender offers, purchases made by the issuer upon another person's exercise of outstanding put rights, and in other transactions through which the company purchases its Section 12 registered equity securities.

In the past, we had proposed requiring issuers that intended to repurchase more than 2% of their stock in a twelve-month period to disclose specified information prior to effecting any repurchases.[71] Issuers also would have been required to disclose this information to the exchange on which the stock was listed for trading or to the NASD if the stock was authorized for quotation on Nasdaq.[72] After receiving comment, we determined that an issuer's obligation to disclose information concerning repurchases of its stock should depend on whether the information is material.[73] Therefore, at the time we adopted Rule 10b–18, we considered the relevant provisions of the federal securities laws and existing policies and procedures of the various self-regulatory organizations as generally sufficient to provide investors and the market with adequate information about issuer repurchases.

Information about how much common stock the issuer has repurchased may be important to investors. Studies have shown that the public announcement by an issuer of a repurchase program is often followed by a rise in the issuer's stock price.[74] Studies have also shown that some issuers publicly announce repurchase programs, but do not purchase any shares or purchase only a small portion of the publicly disclosed amount.[75] Thus, disclosure of an issuer's actual repurchases would inform investors whether the issuer had followed through on its original plan.[76] Investors

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[67] With respect to resales of any securities acquired pursuant to a Rule 10b–18 ''special purchase,'' the NYSE petitions the Commission to exercise its exemptive authority to provide that such securities are not subject to re-registration under the Securities Act of 1933, and are not deemed to be ''restricted securities'' in any way, provided that such securities have been held by the independent trustee for a minimum of two weeks, and are sold by the independent trustee in a manner free of any influence or control by the issuer.

[68] For purposes of Item 703 of Regulations S–K and S–B, the term ''equity securities'' is defined in Section 3(a)(11) of the Exchange Act. For purposes of Form 20–F, the term ''equity securities'' is defined in General Instruction F to Form 20–F.

[69] *See* proposed Item 703 of Regulations S–K and S–B (17 CFR 229.703 and 228.703), Item 2(b) to Forms 10–Q and 10–QSB, Item 5(c) to Forms 10–K and 10–KSB, Item 15(e) to Form 20–F, and Item 6 to proposed Form N–CSR.

[70] *Id.*

[71] Proposed Rule 13e–2(d)(1). *See* 1980 Proposing Release, *supra* note 2, 45 FR at 70897.

[72] Proposed Rule 13e–2(d)(2).

[73] 1982 Adopting Release, *supra* note 1, 47 FR at 53335.

[74] *See* Comment, R. and Jarrell, G., ''The Relative Signaling Power of Dutch-Auction and Fixed-Price Self-Tender Offers and Open-Market Share Repurchases,'' *Journal of Finance* 46 (1991), pp. 1243–71; Asquith, P. and Mullins, D., ''Signaling with Dividends, Stock Repurchases and Equity Issues,'' *Financial Management* 15 (1986), pp. 27–44; Vermaelen, T., ''Common Stock Repurchases and Market Signaling,'' *Journal of Financial Economics* 9 (1981), pp. 139–83; and Dann, L., ''The Effects of Common Stock Repurchase on Security Holder's Returns,'' *Journal of Financial Economics* 9 (1981), pp. 101–138.

[75] If an issuer announced a repurchase program, but had no intention to make purchases, it may violate the anti-fraud and anti-manipulation provisions of the federal securities laws.

[76] *See* Stephens and Weisbach, *supra* note 1. *See also* Ikenberry, David, *et al.,* ''Stock Repurchases in Canada: Performance and Strategic Trading,''

also would have information regarding an issuer's repurchase activity in order to assess its possible impact on the issuer's stock price, similar to periodic disclosure of issuer earnings and dividend payouts.[77] Finally, investors should also be apprised when an issuer repurchase plan has expired, has been terminated, and where no repurchase activity has occurred for some period whether the issuer nevertheless intends to continue the repurchase program.[78]

The importance of requiring disclosure of issuer repurchases was made more apparent when the Commission temporarily afforded emergency relief regarding Rule 10b–18 following the September 11, 2001 attacks on the World Trade Center and the Pentagon.[79] The Commission's emergency action (which temporarily eased Rule's 10b–18's timing and volume limitations) was designed to provide for potential additional liquidity in order to facilitate the reopening of the U.S. equities markets on September 17, 2001, and the continued orderly operation of the markets during the weeks following. However, because Rule 10b–18 does not require disclosure, it is difficult to assess precisely how much of the purchasing activity was attributable to issuer repurchases and how much was attributable to non-issuer trading activity. Requiring issuers to disclose their repurchases in their periodic reports would provide investors with important information regarding the company's purchasing activity. It also would provide the Commission with useful information in assessing the level and market impact of issuer repurchases, as well as in responding to future market emergencies.

We also are seeking comment on whether the Commission should require issuers to disclose information about their repurchase activity on a more frequent basis (*e.g.*, on a monthly basis or within 10 days of the transaction). In cases, for example, in which an issuer makes repurchases only at the beginning of the quarter, a shareholder would not have any information about the issuer's repurchases activity until three or four months later when the issuer's Form 10–Q is filed. Thus, requiring issuers to disclose on a more-timely basis might be more helpful to investors than requiring disclosure on a quarterly basis, as is currently proposed. More frequent disclosure also would allow the Commission to monitor more effectively the level and market impact of an issuer's repurchase activity.

Q. Does the proposed disclosure requirement in new Item 703 of Regulation S–K and Regulation S–B) provide useful information to the market? Is there other information in addition to that which we are proposing that would be useful to include in Item 703 (*e.g.*, the company's intended use for the repurchased shares or the purpose for making the specific purchase, the date and price of each purchase, the source of funds for the repurchase, the average number of shares purchased per day—based on the number of days on which the issuer purchased shares—and the specific days the repurchases were made)?

Q. Should we require the information to be disclosed in ''tabular'' format as we propose?

Q. Should there be different treatment of purchases that exceed a specified threshold (number of shares, dollar amount, percentage of shares outstanding, etc.)? For example, should trade-by-trade information be provided for trades over a certain size? If so, what is an appropriate measure to trigger the more specific information?

Q. Should there be different treatment of small or *de minimis* repurchases? For example, if the repurchases in a quarter are below a specified dollar or share threshold, should issuers be permitted to omit the specific information provided in Item 703 and instead make summary disclosure of the *de minimis* repurchases? Similarly, if repurchases fall below a specified threshold, should issuers be permitted to aggregate the disclosure for the quarter rather than disclose information on a monthly basis? If so, what would be an appropriate threshold? Should the threshold be a fixed share or dollar amount or should it vary depending on the company's public float, average daily trading volume, or other measure?

Q. We propose brief footnote disclosure of the general nature of repurchases made outside of publicly announced repurchase plans or programs in order to provide investors with a more complete picture regarding an issuer's repurchase activity. Does such disclosure serve a useful purpose? Should we require more detailed information with respect to those transactions, such as date of purchase, price, terms of the transaction, and relationship of the seller to the company? If so, what additional details should Item 703 require with respect to those transactions? Should we require this disclosure for all repurchases made outside of publicly announced plans or programs or only for specified categories of transactions, such as privately negotiated transactions? Should we require additional disclosure with regard to repurchases made outside of publicly announced plans or programs for transactions that exceed a specified threshold in magnitude? If so, what is an appropriate threshold?

Q. Our proposal would only require disclosure of issuer purchases of equity securities of a class registered by the issuer under Section 12 of the Exchange Act. This would include disclosure of issuer purchases of securities convertible into the issuer's equity securities or options to purchase the issuer's equity securities if those convertible securities and options are themselves equity securities of a class

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Journal of Finance, 55 (October 2000), pp. 2373–97 (noting that the fraction of shares actually repurchased in connection with Canadian stock repurchase programs is surprisingly low, for example, at termination of the program, roughly a quarter of the firms did not repurchase any shares). Under Canadian law, issuers must report each month the number of shares they actually repurchase. *Id.*

[77] *See, e.g.*, Grullon, G. and Ikenberry, D., ''What Do We Know About Stock Repurchases,'' *Journal of Applied Corporate Finance* 13 (2000), pp. 31, 40–41 (discussing how corporations have been substituting repurchases for dividends, as economic equivalent means of returning excess capital to shareholders). Moreover, requiring such disclosure would be analogous to the requirement that corporate insiders disclose their own transactions involving the company's stock. *See, e.g., id.,* at 48 (emphasizing the need to regulate consistently economically equivalent practices, the authors note that ''[a]lthough firms repurchasing stock are not required to disclose any of their trades, if management makes the same decision on a personal account, details about the trades must be promptly disclosed to the SEC and then made public in short order''). *See also* Cook, Douglas et al., ''Safe Harbor or Smoke Screen? SEC Guidelines for Executing Open Market Repurchases,'' (Working Paper) (May 1999, revised April 9, 2001) (forthcoming in *The Journal of Business*) (questioning the regulatory effectiveness of safe harbors without mandatory disclosure).

[78] Disclosure to this effect would be required in the proposed disclosure forms.

[79] On September 14, 2001, the Commission issued an ''Emergency Order Pursuant to Section 12(k)(2) of the Exchange Act Taking Temporary Action to Respond to Market Developments.'' Securities Exchange Act Release No. 44791 (September 14, 2001). This Emergency Order temporarily modified certain Commission rules and regulations governing issuer stock repurchases for an initial five-day period beginning September 17, 2001 and ending September 21, 2001. The Commission extended the period for an additional five days, ending on September 28. Securities Exchange Act Release No. 44827 (September 21, 2001). On September 28, the Commission used an exemptive authority under Section 36 of the Exchange Act to temporarily modify certain conditions of Rule 10b–18 for issuers that repurchase their own common stock during the period October 1–12, 2001. Securities Exchange Act Release No. 44874 (September 28, 2001).

In the event that there is another ''market emergency'' that does not fit within the meaning of a ''market-wide trading suspension'' (as defined under the rule), as was the case with the events following September 11, the Commission would have the same emergency and exemptive authority as above (*i.e.*, under Sections 12(k)(2) and 36(a)(1) of the Exchange Act) to modify the safe harbor conditions, as it deems necessary.

registered under Section 12 of the Exchange Act. Should this disclosure be limited to securities that are presently convertible into the issuer's equity securities and options that are in the money or should it cover all purchases of registered convertible securities and options? Should this disclosure encompass security futures products? Should we limit the disclosure requirement to common stock of a class registered under Section 12 and exclude convertible securities and options?

Q. Should we require disclosure of equity securities as defined in Section 3(a)(11) of the Exchange Act, as we propose? Is this definition too narrow or too broad? Should we limit the disclosure requirement to equity securities listed on a national securities exchange or quoted on an inter-dealer quotation system?

Q. We propose to require disclosure in the table of purchases on a rolling-month basis, beginning with the first day of the quarter covered by the report. For example, if the quarter begins on January 15 and ends on April 15, the chart would show repurchases for the months from January 15 through February 14, February 15 through March 14, and March 15 through April 15. Is this an appropriate approach? If not, what approach should we take?

Q. Should we require disclosure of the broker-dealer that effected the purchases as we propose? Should this information be reported solely for the Commission's use, and kept confidential at the issuer's request, or should it be publicly disclosed? What if any value is there in the public disclosure of this information? Is it unduly burdensome to companies to make this disclosure?

Q. Should compliance with the proposed disclosure requirement be made a condition of using the safe harbor or should issuers be required to disclose their repurchases regardless of whether they rely on the safe harbor? If the latter, should Rule 10b–18 contain a specific disclosure requirement as a condition of the safe harbor, similar to other Commission regulations that link a safe harbor with disclosure (*e.g.*, Regulation D with Form D and Rule 144 with Form 144)? What specific types of information would be useful to investors regarding an issuer's repurchase activity?

Q. Would requiring specific disclosure as a condition of the safe harbor provide a useful way to monitor the operation of (or verify compliance with) the safe harbor? Would it provide useful information in assessing the level and market impact of issuer repurchases?

Q. Is our proposal to require disclosure on a quarterly basis sufficient, or would more frequent disclosure (*e.g.*, monthly or on a ''real time'' basis) be more meaningful to investors? If so, how should the disclosure be made (*e.g.*, issuing monthly press releases or reporting such purchases to the tape using a special trade indicator)? Please provide specific suggestions.

Q. Should issuer repurchases be reported on Form 8–K or otherwise on a more current basis than proposed?

Q. In addition to the proposed required quarterly disclosure of aggregate volume and average price information, should an issuer also be required to maintain (and provide to the Commission, upon request) separately retrievable written records concerning the trade details (trade-by-trade information) about the manner, timing, price, and volume of its repurchases?

Q. Would disclosure regarding an issuer's transactions involving derivatives (*e.g.*, short put-options, forward contracts, or synthetic forward contracts) written on the issuer's own stock provide useful information to the market?

Q. If so, what additional details should Item 703 require with respect to put options and other derivative transactions?

Q. If the information called for by Item 703 is disclosed elsewhere in filings made with the Commission, should the issuer be permitted to cross reference to the other disclosure rather than repeat the information in the table or should all information be provided in the table?

Q. Should Item 703 require separate columnar disclosure only of repurchase programs or plans that have been *publicly announced* by the issuer, as we propose? Should we instead require separate columnar disclosure of all repurchase plans or programs that have been approved by the issuer's board of directors?

Q. Should the Commission require issuers to disclose their plans before making any purchases? Would prospective disclosure of anticipated repurchases be useful to investors? If so, should this requirement apply to all repurchases or only to anticipated purchases above a prescribed dollar, share, or percentage threshold? Should any other criteria apply to the determination whether repurchases are required to be disclosed prospectively? Should this information be disclosed on Form 8–K or Form 10–Q?

Q. Should the disclosure in the table under Item 703 be segregated to identify open market purchases (made within the safe harbor), privately negotiated transactions, purchases made pursuant to an issuer tender offer, or other specific types of transactions?

Q. When an affiliated purchaser makes purchases should these purchases be disclosed separately in the table? Should we require disclosure of the identity of the purchaser and its relationship to the issuer? Should disclosure be required of any agreements or arrangements that exist between the purchaser and the issuer related to the purchase?

Q. We propose to amend Form 20–F to require tabular disclosure of issuer repurchases by foreign private issuers. Should the new disclosure requirement apply to foreign private issuers as proposed? Some foreign jurisdictions already have requirements to disclose issuer repurchases of their securities. Should our disclosure requirement mirror the requirements in the issuer's home country?

Q. Foreign private issuers file one prescribed periodic report per year on Form 20–F. Would this annual disclosure of an issuer's repurchase activity be useful to investors? Should the repurchases be broken out on a monthly basis as we propose? Alternatively, should they be aggregated on a quarterly basis or for the entire year?

Q. Our proposal would require disclosure of repurchases of all shares of a company's equity securities of a class registered under Section 12 of the Exchange Act. Should we limit the disclosure requirement to exclude purchases made outside the United States? Would information about domestic repurchases, on its own, be meaningful to investors?

Q. In our proposed amendment to Form 20–F, we propose to apply the definition of ''equity securities'' in General Instruction F to Form 20–F. Is this an appropriate definition of the securities to which the disclosure requirement should apply? Should we use the statutory definition of equity securities as we do in proposed Item 703?

Q. We propose to require companies filing Forms 10–K and 10–Q to disclose the identities of brokers executing the transactions, which would provide the Commission with access to information regarding an issuer's repurchase activity (*i.e.*, in order to monitor more effectively the level and market impact of an issuer's repurchase activity). However, because we are not the primary regulators of private foreign issuers, we do not propose to require disclosure of the broker executing purchases for foreign private issuers

filing reports on Form 20–F. Should we require disclosure of the brokers that execute the purchases on behalf of foreign private issuers? Should we require disclosure of the brokers only when the purchases are made in reliance on Rule 10b–18?

Q. We propose to require separate disclosure of repurchases pursuant to publicly announced programs. Would this separate disclosure be helpful to investors? Do foreign private issuers typically announce their programs? If not, should we remove this column from the table in proposed Item 15(e) of Form 20–F?

Q. The securities of some foreign companies trade in the United States in the form of depositary receipts. Would it be useful to require disclosure of repurchases of the receipts and the shares separately?

Q. The securities of many U.S. and foreign companies trade in markets outside the United States in currencies other than the U.S. dollar. What currency should issuers use in reporting their repurchases? Should foreign companies be given the flexibility to choose the appropriate currency to report their repurchases, based upon management's assessment of the most appropriate disclosure?

Q. To the extent a foreign or a U.S. company repurchases securities outside the United States, should there be disclosure of the markets on which such repurchases took place? Would investors find it useful for issuers to disclose information as to the amount of securities repurchased in any particular market?

Closed-End Funds

Closed-end funds would provide the required disclosure semi-annually on proposed Form N–CSR. Currently, closed-end funds are required to disclose information regarding privately negotiated repurchases of their securities on Form N–23C–1 not later than the tenth day of the calendar month following the month in which the purchase occurs.[80] This information includes the date of the transaction, identification of the security purchased, number of shares purchased, price per share, approximate asset value per share at the time of purchase, and name of the seller or the seller's broker. In addition, Form N–SAR, the semi-annual reporting form for registered investment companies, requires closed-end funds to disclose the aggregate number of shares and net consideration paid for all repurchases and redemptions of their common and preferred stock during the semi-annual reporting period.[81]

We believe that, as with other issuers, additional information regarding repurchase offers by closed-end funds would be useful to investors.[82] We are not currently proposing to eliminate or amend the reporting requirements of Form N–23C–1, which apply on a transaction-by-transaction basis only to privately negotiated repurchases, or the requirements of Form N–SAR, which provide the Commission with aggregate data on sales, repurchases, and redemptions of closed-end fund shares over a semi-annual period.

Q. Should closed-end funds be subject to the additional disclosure requirements that we are proposing, or are the disclosures that they are currently required to provide adequate? Is proposed Form N–CSR the appropriate location for closed-end funds to disclose additional information regarding their repurchases? Should we instead require closed-end funds to provide this information on Form N–23C–1 or Form N–SAR?

Q. Should we eliminate Form N–23C–1, and modify Rule 23c–1 to eliminate the requirement in paragraph (a)(11) that privately negotiated repurchases of closed-end fund shares be reported in the month following the transaction? How is the information on Form N–23C–1 used by investors? Would the semi-annual disclosure that we are proposing adequately fulfill investors' needs for information regarding repurchases? Should we eliminate the line items in Item 86 of Form N–SAR that require semi-annual disclosure by a closed-end fund regarding repurchases of its common and preferred stock?

Q. How frequently should we require closed-end funds to disclose information regarding repurchases of equity securities? Should we require quarterly disclosure of repurchases by closed-end funds as we propose to do for operating companies? If disclosure should be made more frequently than semi-annually, how should more frequent disclosure be provided?

VII. General Request for Comment

We request and encourage any interested person to comment generally on these proposals. In addition to the specific requests for comment, the Commission invites interested persons to submit written comments on all aspects of the proposed amendments. The Commission also requests commenters to address whether the proposed Rule 10b–18 amendments provide appropriate safe harbor conditions in light of market developments since Rule 10b–18's adoption in 1982. The Commission seeks comment on whether the safe harbor proposals raise any manipulation risks. Commenters may also discuss whether there are legal or policy reasons why the Commission should consider a different approach. For instance, should the Rule 10b–18 volume condition be further restrained or relaxed? Should the safe harbor's time of purchase condition be broader, narrower, or include different parameters? Additionally, the Commission seeks comment about whether the proposed disclosure amendments to Regulations S–K and S–B, Forms 10–K(KSB), 10–Q(QSB) and 20–F, and proposed Form N–CSR provide meaningful and timely information to investors.

The Commission encourages commenters to provide information regarding the advantages and disadvantages of each proposed amendment. The Commission invites commenters to provide views and data as to the costs and benefits associated with the proposed amendments. We also seek comment regarding other matters that may have an effect on the proposed amendments.

VIII. Paperwork Reduction Act

A. Collection of Information Under These Amendments

Certain provisions of the proposed amendments contain ''collection of information'' requirements within the meaning of the Paperwork Reduction Act of 1995 (PRA);[83] the Commission has submitted information to the Office of Management and Budget (OMB) for review in accordance with 44 U.S.C. 3507(d) and 5 CFR 1320.11. The Commission is revising the several currently approved collections of

[80] Rule 23c–1(a)(11) under the Investment Company Act [17 CFR 270.23c–1(a)(11)]; Form N–23C–1 [17 CFR 274.201]. Of 125 Form N–23C–1 filings made during the year ending September 30, 2002, it appears that at least 37 of these filings were not required under Rule 23c–1 (no repurchases occurred in the prior month or repurchases on the open market).

[81] Lines B and D of Item 86 of Form N–SAR [17 CFR 249.330; 17 CFR 274.101]. Item 86 also requires disclosure of the aggregate number of shares and net consideration received for sales of a closed-end fund's common and preferred stock during the reporting period, as well as aggregate sale and repurchase and redemption information for debt securities.

[82] *See generally* Thomas J. Herzfeld, *Market Shakeout Leads to Unprecedented Number of Share Buyback Announcements*, Investor's Guide to Closed-End Funds (Oct. 1998) (discussing actual buybacks after announcements and the use of buybacks to reduce closed-end fund discounts and noting that ''many funds maintain the authorization to repurchase their own shares in the open market, but only a handful buy back significant numbers of shares'').

[83] 44 U.S.C. 3501 *et seq.*

information titled ''Regulation S–K,'' ''Regulation S–B,'' ''Form 10–Q,'' ''Form 10–QSB,'' ''Form 10–K,'' ''Form 10–KSB'' and ''Form 20–F'' under OMB control numbers 3235–0071, 3235–0417, 3235–0070, 3235–0416, 3235–0063, 3235–0420, and 3235–0288 respectively. The Commission also is revising the collection of information titled ''Form N–CSR'' under OMB control number 3235–0570. An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid control number.

B. Need for and Proposed Use of the Collection of Information

We believe that the proposed amendments to Regulations S–K, S–B, Forms 10–Q, 10–QSB, 10–K, 10–KSB, 20–F, and proposed Form N–CSR are necessary (1) to facilitate the transparency of registrants' repurchases, (2) to bolster investor confidence in the integrity of the securities trading markets, and (3) to monitor and assess the level and market impact of registrants' repurchases.

C. Respondents

The proposed amendments to Regulations S–K, S–B, and Forms 10–K, 10–KSB, 10–Q, 10–QSB, 20–F, and proposed Form N–CSR would require disclosure of all repurchasing activity (*e.g.*, open market purchases, tender offers, and other transactions). Approximately 708 issuers announced 796 new or expanded repurchase programs in 2000.[84]

The degree to which the proposed amendments will affect registrants and other issuers will vary from year to year. A registrant's decision to conduct open market or privately negotiated repurchases is a discretionary decision. These decisions are based on the entity's assessment of its current needs and other continually changing factors. Thus, the number of registrants who would make the proposed disclosures would vary from quarter to quarter and year to year.

D. Total Annual Reporting and Recordkeeping Burden

1. Proposed Amendments to Regulations S–K and S–B, and Forms 10–Q, 10–QSB, 10–K, 10–KSB, 20–F, and N–CSR

We estimate that the average amount of time it would take to prepare the tabular disclosure required by proposed new Item 703 of Regulations S–K, S–B, Form 20–F, and proposed Form N–CSR would be approximately one hour per annual, semi-annual, or quarterly report filing.[85] To determine the average total number of hours each entity would spend completing Forms 10–K, 10–KSB, 10–Q, 10–QSB, 20–F, and Form N–CSR if we adopt the proposed disclosure, we added the one-hour increment to the current burden hours estimated for each form.

With respect to Forms 10–K, 10–KSB, 10–Q and 10–QSB, we estimate that the company bears 75% of the burden of preparation internally and that 25% of the burden of preparation is borne by outside professionals retained by the company at an average cost of $300 per hour.[86] With respect to Form 20–F, we estimate that 25% of the burden of preparation is borne by the company internally and that 75% of the burden of preparation is borne by outside professionals retained by the company at an average cost of $300 per hour.[87] The portion of the burden borne by outside professionals is reflected as a cost, while the portion of the burden carried by the company internally is reflected in hours.

Next, we base our estimates on the actual number of filings in the fiscal year 2002 (8,484 10–K filings, 3,820 10–KSB filings, 23,743 10–Q filings, 11,299 10–QSB filings, and 1,194 20–F filings). We also estimate, based on data indicating that approximately 708 companies announced repurchase programs in 2000, that approximately 1,000 would include the proposed repurchase disclosure in their filings.[88] We further estimate that each of the 1,000 companies would include the proposed disclosure in each of its periodic reports filed during the fiscal year on the assumption that a typical open market repurchase program lasts two to three years.[89] Because we do not have specific data indicating the number of repurchases conducted by type of issuer (*e.g.* large issuers, small business issuers, foreign private issuers), we estimate that the number of repurchases made by a given type of issuer was proportionate to the number of filings made by that type of issuer.

We estimate that an incremental burden of 472.5 hours (630×75) and an incremental cost of $47,250 ($630 \times .25 \times \$300$) would be imposed on companies filing Form 10–K if we adopt the proposals. The estimated incremental burden for Form 10–KSB would be 210 hours ($280 \times .75$) and the incremental cost would be approximately $21,000 ($280 \times .25 \times \$300$). The estimated incremental burden for Form 10–Q would be 1,417.5 hours ($1,890 \times .75$) and the incremental cost would be approximately $141,750 ($1,890 \times .25 \times \$300$). The estimated incremental burden for Form 10–QSB would be 630 hours ($840 \times .75$) and the incremental cost would be approximately $63,000 ($840 \times .25 \times \$300$). The estimated incremental burden for Form 20–F would be 22.5 hours ($90 \times .25$) and the estimated cost would be approximately $20,250 ($90 \times .75 \times \$300$).

The table below illustrates the estimated incremental annual compliance burden in hours and in cost for annual and quarterly reports if we adopt the proposals.

[84] The data source is Securities Data Corp. For purposes of this paragraph and those that follow, we use repurchasing information from the year 2000 rather than 2001. Repurchasing information for the year 2001 is distorted in light of the issuer repurchases effected pursuant to the emergency and exemptive relief issued following September 11th. *See* note 79, *supra*. Repurchasing information for the year 2002 was not used because repurchasing data for the year would be incomplete since 12 calendar months have not yet elapsed. However, we note that 206 issuers announced 217 new or expanded repurchase programs during the period January 1, 2002 through July 31, 2002. The data source is Securities Data Corp.

[85] The information required to be disclosed in proposed new Item 703 would be readily available to the company.

[86] The 75% internal/25% outside professional burden allocation is based on information that we have received from registrants indicating that most of the burden of preparing annual and quarterly reports is borne internally by the company. The $300 hourly cost estimate for outside professionals is based on consultations with several outside law firms and other persons who regularly assist companies in preparing and filing annual and quarterly reports with the Commission.

[87] We estimate that outside professionals carry the greater burden of preparation of Form 20–F because that Form requires the financial statements and schedules that must be included in the Form 20–F filing to disclose an information content substantially similar to financial statements that comply with United States generally accepted accounting principles and Regulation S–X.

[88] We estimate that 1,000, rather than 708, issuers would include the proposed disclosure in their filings because the 708 estimate includes only announced repurchase programs. We have no data regarding the number of unannounced repurchase programs conducted in 2000 but estimate the number to be 300 for purposes of the PRA burden analysis. We solicit comment on the accuracy of this estimate.

[89] *See,* Gustavo Grullon and David Ikenberry, ''What Do We Know About Stock Repurchases,'' *Journal of Applied Corporate Finance,* at p. 33 (2000).

INCREMENTAL BURDEN ESTIMATES

	Annual responses	Incremental burden response hours/ form	75% company	25% professional	$300 professional cost
	(A)	(B)	(C)=(A)*(B)*.75	(D)=(A)*(B)*.25	(E)=(D)*300
10–K	630	1	472.5	157.5	47,250
10–KSB	280	1	210	70	21,000
10–Q	1,890	1	1,417.5	472.5	141,750
10–QSB	840	1	630	210	63,000
			25% Company	75% Professional	$300 Prof. Cost
Form 20–F	90	1	(C)=(A)*(B)*.25 22.5	(D)=(A)*(B)*.75 67.5	(E)=(D)*300 20,250

Proposed new Item 703 of Regulations S–K and S–B, proposed new Item 15(e) of Form 20–F, and proposed new Item 6 of proposed Form N–CSR would require disclosure of all issuer repurchases of shares (or other units) of any class of the issuer's equity securities that is registered under Section 12 of the Exchange Act. The issuer would have to present this disclosure in tabular format. Specifically, the issuer would have to disclose all repurchases of its registered equity securities (both open market and private transactions) for that quarter, including the total number of shares (or units) purchased (which would be reported on a rolling basis), the average price paid per share, the identity of the broker dealer(s) used to effect the purchases, the number of shares (or units) purchased as part of a publicly announced plan or program, and the maximum number (or approximate dollar value) of shares that may yet be purchased under the plans or programs. The table would also have to include footnotes that briefly disclose the nature of the transaction for purchases made other than pursuant to a publicly announced repurchase plan or program. These would include for example, open market and privately negotiated purchases, issuer tender offers, purchases made by the issuer upon another person's exercise of outstanding put rights, and in other transactions through which the company purchases its registered equity securities. We also propose footnote disclosure of the principal terms of publicly announced repurchase plans or programs, including the date of announcement, the share or dollar amount approved, and the expiration date (if any) of the plans or programs. Additionally, the proposed footnote disclosure would indicate for each plan or program during the period covered by the table, plan or program expirations, plan or program terminations, and if there has been no repurchasing but the issuer still intends to repurchase pursuant to the plan or program.

Closed-end funds would be required to provide similar disclosure on new Item 6 of proposed Form N–CSR. With respect to proposed Form N–CSR, we estimate that 75% of the burden of preparation is carried by the company internally and 25% of the burden of preparation is born by outside professionals retained by the company at an average cost of $300 per hour. Of the 3,700 registered management investment companies required to file reports on proposed Form N–CSR, 630 of those companies are closed-end funds that would be required to comply with new Item 6, resulting in 1,260 filings per year (630 closed-end funds × 2 filings per year) by closed-end funds. We estimate that an incremental burden for proposed Form N–CSR would be 945 hours annually (1 hour × 1,260 filings × .75) and the incremental costs would be approximately $94,500 (1 hour × 1,260 filings × .25 × $300).

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to: (i) Evaluate whether the proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; (ii) evaluate the accuracy of the Commission's estimate of the burden of the proposed collection of information; (iii) determine whether there are ways to enhance the quality, utility, and clarity of the information to be collected; and (iv) evaluate whether there are ways to minimize the burden of the collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons submitting comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, DC 20503, and should also send a copy of their comments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549–0609, with reference to File No. S7–50-02. Requests for materials submitted to OMB by the Commission with regard to this collection of information should be in writing, refer to File No. S7–50–02, and be submitted to the Securities and Exchange Commission, Records Management, Office of Filings and Information Services. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication. Consequently, a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

IX. Costs and Benefits of the Proposed Amendments

The Commission is considering the costs and the benefits of the proposed amendments to Regulations S–K, S–B, Forms 10–Q, 10–QSB, 10–K, 10–KSB, 20–F, and N–CSR, and Rule 10b–18. The Commission encourages commenters to discuss any additional costs or benefits. In particular, the Commission requests comment on the potential costs for any modifications to information gathering, management, and recordkeeping systems or procedures, as well as any potential benefits resulting from the proposals for registrants, issuers, investors, broker-dealers, other securities industry professionals, regulators, and others. Commenters should provide analysis and data to support their views on the costs and benefits associated with the proposed amendments.

A. Costs and Benefits of the Proposed Amendments to Rule 10b–18

1. Costs

As an aid in evaluating costs and reductions in costs associated with the proposed Rule 10b–18 modifications, the Commission requests the public's views and any supporting information. The Commission believes that the

proposed amendments would impose negligible costs, if any, on issuers and would not compromise investor protection. The Commission notes that any costs related to complying with the proposed amendments to Rule 10b–18 are assumed voluntarily because the Rule provides an optional safe harbor. The Commission solicits comments as to whether the proposed amendments impose greater costs on issuers than the current Rule.

2. Benefits

We believe that the proposed amendments to Rule 10b–18 would simplify, clarify, and update its provisions in light of market developments since its adoption in 1982. These proposed amendments provide clarity as to the scope of permissible market activity for issuers and the broker-dealers that assist them in their repurchasing. Many issuers might be reluctant to repurchase without the certainty that their activity comes within the safe harbor. If an issuer effects repurchases in compliance with Rule 10b–18, it will avoid what might otherwise be substantial and unpredictable risks of liability under the anti-manipulative provisions of the Exchange Act. If adopted, the amendments would continue to facilitate corporate goals, such as ensuring the availability of common stock to complete potential transactions, substituting share repurchases for dividend payments, and other corporate objectives.

The inclusion of block purchases in the volume condition would establish a reasonable limit on the amount of repurchasing activity that is protected by the safe harbor, which, in turn, prevents issuers from dominating the market in their securities. Pricing established by independent market forces rather than by an issuer's substantial repurchasing activity would promote investor confidence and enhance the integrity of the securities markets. Additionally, eliminating the block exception would not impede an issuer's ability to repurchase within the safe harbor as there is no limit on the number of days over which repurchasing can be conducted. An issuer that reaches the 25% limit on one day has the option of repurchasing additional shares on a subsequent day. Also, the inclusion of block purchases in an issuer's trading volume creates a greater base figure on which the issuer would calculate its 25% volume. This would increase the amount of stock that some issuers can repurchase within the safe harbor to facilitate an issuer's goals such as having shares available for dividend reinvestment, stock options, or employee stock ownership plans. Further, eliminating the block exception simplifies an issuer's volume calculation because block purchases would no longer be subtracted from volume. The simplified calculation eases an issuer's burden and reduces the chance for errors in the volume calculation.

The proposed option for an issuer to purchase either 25% of ADTV or a daily aggregate amount of 500 shares, whichever is higher, may provide thinly traded issuers with an increased amount of common stock that may be repurchased within the safe harbor. Moreover, the proposed alternative volume condition applicable following market-wide trading suspensions should provide an infusion of liquidity by allowing issuers to purchase up to 100% of ADTV. This proposed alternative should also prevent sell side order imbalances by reducing issuer reluctance to repurchase in response to order imbalances that may occur in severe market declines.

Next, the proposed 10-minute timing modification would allow issuers whose securities are less susceptible to manipulation to remain in the market for a longer period and implement a trading strategy in an orderly manner throughout the day. This can also result in issuers providing additional liquidity to the market for more of the day. The safe harbor eases issuer reluctance to repurchase. Some issuers might be hesitant to repurchase without the certainty of the safe harbor protection. If these issuers repurchase, their safe harbor repurchases provide liquidity to the marketplace.

Although the proposed 10-minute timing modification allows issuers less susceptible to manipulation to stay in the market for a longer time period, it retains a reasonable limit on issuer activity that may influence market prices at or near the close. Approximately 362 out of the 708 issuers that announced repurchase programs in 2000 had a public float that would satisfy the 10-minute timing modification.[90]

Lastly, the uniform price condition for all issuers makes use of the safe harbor easier for broker-dealers repurchasing for numerous issuers. This condition also prevents issuers from setting or influencing the price of their common stock.

These benefits are difficult to quantify. The Commission encourages commenters to provide empirical data or other facts to support their views concerning these and any other benefits not mentioned here. In particular, the Commission requests data and analysis on what effect the proposed changes may have on market liquidity.

B. Costs and Benefits of the Proposed Amendments to Regulations S–K and S–B, Forms 10–Q, 10–QSB, 10–K, 10–KSB and 20–F, and Form N–CSR

1. Costs

To assist the Commission in its evaluation of the costs that may result from the proposals, commenters are requested to provide views, analysis, and empirical data relating to any costs associated with these proposals and any costs, not already identified, should the amendments be adopted as proposed. The Commission expects that any costs would be reduced significantly as registrants become more familiar with the proposed disclosure.

Registrants would be required to disclose, with respect to their repurchases, the total number of shares repurchased, the average price per share, the amount of shares that were repurchased pursuant to a publicly announced plan or program, the maximum number (or approximate dollar value) of shares (or units) that may yet be repurchased under the plans or programs, and in Item 703 and Form N–CSR disclosures the identity of the broker-dealer(s) used to make the repurchases. Many registrants currently collect and publish repurchase information concerning the number of shares repurchased, the total dollar amount paid for the repurchases or the average price paid per share, and/or the number of shares or dollar amount available for repurchase under a particular repurchase program.[91] We

[90] Based on data from Compustat, we identified that 362 of the 708 issuers of repurchase programs had a market value of $150 million or greater. Market value is a proxy for public float.

[91] *See CGS Systems International, Inc. Reports First Quarter 2002 Results,* PR Newswire (April 29, 2002) (publishing the number of shares repurchased, the average price paid per share, and the remaining number of shares available for repurchase under the repurchase program); *Republic Services, Inc. Reports First Quarter Earnings per Shares of $0.32,* PR Newswire (April 29, 2002) (publishing the number of shares repurchased, the total dollar amount paid for the repurchases, and the dollar amount remaining under the repurchase program); *Quotesmith.com 1Q Loss 14 Cents a Share,* Dow Jones News Service (April 29, 2002) (publishing the number of shares repurchased and the average price paid per share); *Gartner Reports Profitability Improvement for Fourth Consecutive Quarter,* Business Wire (April 24, 2002) (publishing the number of shares repurchased and the average price paid per share); *Datascope Third Quarter Results,* PR Newswire (April 24, 2002) (publishing the number of shares repurchased and the total dollar amount paid); and *DST Systems, Inc. Announces First Quarter 2002 Financial Results,* PR Newswire (April 24, 2002) (publishing the number of shares repurchased, the

request comment as to whether registrants would incur new costs to establish systems to collect and publish repurchase information that they would need to satisfy the proposed disclosure requirements. If so, please provide data regarding the estimated costs that registrants would incur. As mentioned in section VIII.D.1., we estimate that the average amount of time it would take to prepare the proposed disclosure would be approximately one hour per annual, semi-annual, or quarterly filing. The incremental burden in terms of internal hours (not monetized) and external monetized costs for each form is explained in section VIII.D.1. above. We request specific comment as to whether the proposed repurchase disclosure could discourage share repurchases by registrants.

2. Benefits

The proposed disclosures may prevent undetected manipulation by deterring repurchase program announcements by registrants that do not intend to effect repurchases but would benefit from a post announcement increase in the price of their common stock. The proposed disclosure requirement would increase market efficiency due to improved information dissemination that otherwise has not been readily available to investors. Presently, investors and market participants have little way of knowing the amount of repurchasing effected by a registrant in any given time period. This disclosure would provide more complete information to investors in order to better assess an issuer, its activities, and its stock price. Registrants use their discretion in deciding whether and when to effect repurchases. Moreover, registrants may not repurchase all, or even any, of the shares they are authorized to repurchase. The proposed disclosure requirement should increase efficiency by providing investors with information regarding the company's stated repurchasing intentions and subsequent repurchases.

The proposed amendments would provide a uniform disclosure system concerning repurchases. This proposed system would benefit investors and other market participants by providing repurchasing information in a readily accessible venue and in a timely manner. The amendments will also provide investors with useful information concerning the manner in which a company makes repurchases (*e.g.*, through open market purchases, tender offers, in satisfaction of a company's obligations upon exercise of outstanding put options, or other transactions).

If adopted, the proposed amendments would shed light on currently undisclosed repurchases. Presently, only certain repurchasing activity must be disclosed, such as repurchases from company insiders and certain repurchases by closed-end funds. This proposal would require comprehensive repurchasing disclosure. For example, the amendments would require disclosure of currently undisclosed activity, such as an issuer repurchasing its stock from put option holders who exercised options issued by the company.

Additionally, the disclosure would provide investors and the marketplace with signaling information. A registrant's repurchases may signal information to investors such as a registrant's belief that its stock is undervalued. In the same way, the proposed disclosure could signal information about market trends.

The proposed disclosure requirement would also provide information about a registrant's use of capital. When registering an offering, a registrant may state various uses of the offering proceeds, including repurchasing. The proposed disclosures would provide follow-up information to such a registration statement disclosure. It is also a valuable way to confirm if any or a portion of the offering proceeds were used for repurchases.

The Commission does not have data to quantify the value of the benefits described above. The Commission seeks comments on how it may quantify these benefits and any other benefits, not already identified, which may result from the adoption of these proposed amendments.

X. Consideration of Impact on the Economy, Effect on Competition and Promotion of Efficiency, Competition and Capital Formation

For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA),[92] the Commission requests information regarding the potential impact of the proposed amendments on the economy on an annual basis. With regard to any comments, we note that such comments are of greatest assistance if they are accompanied by supporting data and analysis of the issues addressed in those comments. Section 23(a)(2) of the Exchange Act [93] requires the Commission to consider the impact any new rule would have on competition. Further, the law requires that the Commission not adopt any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act.

The Commission has considered the proposed rules in light of the standards cited in Section 23(a)(2) and believes preliminarily that, if adopted, they would not likely impose any significant burden on competition not necessary or appropriate in furtherance of the Exchange Act. Rule 10b–18 is a safe harbor rather than a mandatory rule and as such issuers choose whether or not to use it. Many issuers might be reluctant to repurchase without the safe harbor. Therefore, the safe harbor may provide increased liquidity to the marketplace from issuers that would not repurchase but for the safe harbor. Issuers also have the option to repurchase securities outside the Rule 10b–18 safe harbor conditions without raising a presumption of manipulation. Moreover, the proposed version of the Rule 10b–18 safe harbor, like the current Rule, would apply to all issuers. Thus, we do not believe the Rule 10b–18 amendments would have a significant effect on competition because all issuers have the option of complying with the manner, volume, time and price conditions.

Additionally, the proposed amendments to Forms 10–K, 10–KSB, 10–Q, 10–QSB, 20–F, and proposed Form N–CSR would apply equally to all filers who make repurchases. Thus, we do not believe that these proposals will have a significant anti-competitive effect.

We request comment on whether the proposed amendments, if adopted, would impose a burden on competition. Commenters are requested to provide empirical data and other factual support for their views if possible.

Section 3(f) of the Exchange Act [94] requires the Commission, when engaged in rulemaking that requires us to consider whether an action is necessary or appropriate in the public interest, to consider whether the action would promote efficiency, competition, and capital formation.

The Commission preliminarily believes that the proposed amendments should improve market efficiency by providing greater clarity in terms of guidance and certainty to issuers (and broker-dealers that assist issuers with

average price paid per share, as well as the fact that the repurchasing was done through a private transaction).

[92] Pub. L. No. 104–121, tit. II, 110 Stat. 857 (1996).

[93] 15 U.S.C. 78w(a)(2).

[94] 15 U.S.C. 78c(f).

their repurchase programs) as to the scope of non-manipulative market activity when repurchasing their stock. The proposed amendments would also enhance market liquidity following a market-wide trading suspension by helping to ensure a deep market and reducing sell side order imbalances. For many issuers, the proposed amendments may result in enhanced liquidity by allowing for repurchase activity within the safe harbor up to 10 minutes prior to the market close. Moreover, we believe the benefits of the proposed disclosure requirements would include increased market efficiency due to improved information and transparency concerning issuer repurchases. If adopted, the disclosures should bolster investor confidence in the markets and make repurchasing information readily accessible to investors. Additionally, the proposed amendments to Forms 10–K, 10–KSB, 10–Q, 10–QSB, 20–F, and N–CSR are intended to improve the amount of current information available to investors and the financial markets. We anticipate that the proposals should improve investors' ability to make informed investment decisions concerning registrants. Informed investor decisions generally promote market efficiency and capital formation.

We request comment on whether the proposed amendments, if adopted, would promote efficiency, competition, and capital formation. Commenters are requested to provide empirical data and other factual support for their views if possible.

XI. Initial Regulatory Flexibility Analysis

The Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) [95] regarding the proposed amendments to Regulations S–K, S–B, Forms 10–Q, 10–QSB, 10–K, 10–KSB, 20–F, N–CSR, and Rule 10b–18.

A. Reasons for the Proposed Action

Based on our experience with the operation of Rule 10b–18, and to reflect market developments since the Rule's adoption, we propose to revise Rule 10b–18's provisions. In addition, we propose to provide investors and the marketplace with important information concerning a registrant's repurchases (*e.g.*, the total number of shares purchased, the average price per share, the identity of the broker-dealer for Item 703 and proposed Form N–CSR disclosures, the number of shares purchased as part of a publicly announced plan or program, and the maximum number (or approximate dollar value) of shares (or units) that may yet be purchased under the plans or programs). We believe the increased transparency concerning registrants' repurchases will promote enhanced evaluation of registrants, their repurchases, and the effects of those repurchases on the registrants' common stock price and the market place generally.

B. Objectives

The proposed Rule 10b–18 amendments are designed to fulfill several objectives. A prime objective of the proposed amendments is to foster investor confidence in the integrity of our securities markets. Second, the proposed amendments are designed to maintain reasonable limits on issuer repurchasing activity within the safe harbor. Third, the proposed amendments would facilitate pricing established by independent market forces. Next, the amendments would allow corporations to provide enhanced market liquidity following market wide trading suspensions. These proposals should ease market stress during periods of severe market decline and promote orderly markets throughout those times. Lastly, the Rule 10b–18 amendments should provide issuers with a tool to help manage the risks of liability under the anti-manipulation rules of the Exchange Act. The proposals are intended to update Rule 10b–18 and provide greater clarity in terms of guidance and certainty to issuers and broker-dealers that assist issuers with their repurchase programs as to the scope of permissible market activity when repurchasing their stock.

The central objective of the proposed disclosure amendments is to provide investors with useful, easy to access information about issuer repurchases. The proposed disclosure amendments are intended to increase market efficiency through improved disclosure. The proposals would provide investors with important information in order to better evaluate registrants. The proposed amendments would shed light on currently undisclosed registrant repurchases providing investors with useful information in order to better assess a registrant and its stock price. Moreover, the disclosures would prevent undetected manipulation by deterring repurchase announcements by registrants that have no intention of repurchasing. They would also provide a means to monitor the level and impact of registrants' repurchases.

C. Legal Basis

The amendments to Rule 10b–18 are proposed pursuant to the authority set forth in Sections 9(a)(2) and 10(b) of the Exchange Act.[96] The amendments to Regulations S–K, S–B, Forms 10–Q, 10–QSB, 10–K, 10–KSB, 20–F, and N–CSR are proposed pursuant to the authority set forth in Sections 12, 13, 15(d), and 23(a) of the Exchange Act and Sections 8, 23, 24(a), 30,31, and 38 of the Investment Company Act.

D. Small Entities Subject to the Rule

The proposed amendments may affect small entity issuers and affiliated purchasers that wish to avail themselves of the safe harbor provisions. Based on Exchange Act Rule 0–10(a), a small issuer is one that on the last day of its most recent fiscal year had total assets of $5,000,000 or less. We estimate that approximately 3 issuers that conducted repurchases in 2000 had assets of less than $5,000,000.[97] The Commission seeks comment on the number of issuers that rely on Rule 10b–18 when engaged in open market repurchases of its stock, and the number of such issuers that are small entities.

The Commission seeks comment on the number of registrants that would make the proposed disclosures following open market and privately negotiated purchases each quarter, and the number of those registrants that are small entities.

E. Reporting, Recordkeeping and Other Compliance Requirements

The proposed Rule 10b–18 amendments would not impose any new reporting, recordkeeping or other compliance requirements. The proposed amendments to Regulations S–K, S–B, Forms 10–K, 10–KSB, 10–Q, 10–QSB, 20–F, and proposed Form N–CSR would add a new disclosure item for issuer purchases of equity securities. As stated in Section XI.D above, approximately 3 issuers who conducted repurchase programs in 2000 were small entities. We believe no additional professional skills beyond those currently possessed by issuers (and broker-dealers) would be necessary to prepare the forms in accordance with the proposed disclosure amendments or to comply with the proposed Rule 10b–18 amendments.

F. Duplicative, Overlapping or Conflicting Federal Rules

The Commission believes that there are no rules that duplicate, overlap, or

[95] This analysis is required by the Regulatory Flexibility Act, 5 U.S.C. 603.

[96] 15 U.S.C. 78i(a)(2), 78j(b).

[97] The source of this data is Compusat.

conflict with, the proposed amendments.

G. Significant Alternatives

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small issuers and broker-dealers. In connection with the proposals, the Commission considered the following alternatives: (a) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (b) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (c) the use of performance rather than design standards; and (d) an exemption from coverage of the proposed amendments, or any part thereof, for small entities.

With respect to the proposed Rule 10b–18 amendments, the Commission believes that the establishment of different requirements for small entities is neither necessary nor practicable, because the proposal provides a voluntary safe harbor from liability for manipulation under the Exchange Act. The Commission believes that the majority of issuers effecting repurchase programs are not small entities.

With respect to the proposed amendments to Regulations S–K, S–B, Forms 10–K, 10–KSB, 10–Q, 10–QSB, 20–F, and proposed Form N–CSR, the Commission believes that any affect on small entities would be minimal. Therefore, it is not feasible to further clarify, consolidate or simplify the proposals for small entities.

H. Solicitation of Comments

The Commission encourages written comments on matters discussed in the IRFA. In particular, the Commission requests comments on (i) the number of issuers conducting repurchase programs and the number of such issuers that are small entities; (ii) the nature of any impact the proposed amendments would have on small entities and empirical data supporting the extent of the impact; and (iii) how to quantify the number of small entities that would be affected by and/or how to quantify the impact of the proposed amendments. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed amendments are adopted, and will be placed in the same public file as comments on the proposed amendments themselves. As discussed above, for purposes of the SBREFA, the Commission is also requesting information regarding the potential impact of the proposed amendments on the economy on an annual basis. Commentators should provide empirical data to support their views.

Persons wishing to submit written comments should send three copies to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549–0609. Comments also may be submitted electronically at the following e-mail address: *rule-comments@sec.gov.* All comment letters should refer to File No. S7–50–02. Comments submitted by e-mail should include this file number in the subject line. Comment letters will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, NW., Washington, DC 20549. Electronically submitted letters also will be posted on the Commission's Internet web site (*http://www.sec.gov*).

XII. Statutory Basis and Text of Proposed Amendment

The Rule amendments are being proposed pursuant to Sections 2, 3, 9(a)(6), 10(b), 12, 13(e), 15, 15(c), 23(a) of the Exchange Act, 15 U.S.C. 78b, 78c, 78i(a)(6), 78j(b), 78m(e), 78o(c), 78o(d) and 78w(a), and Sections 8, 23, 24(a), 30, 31, and 38 of the Investment Company Act, 15 U.S.C. 80a–8, 80a–23, 80a–24(a), 80a–29, 80a–30, and 80a–37.

List of Subjects

17 CFR Part 228

Reporting and recordkeeping requirements, Securities, Small businesses.

17 CFR Part 229

Reporting and recordkeeping requirements, Securities.

17 CFR Part 240

Brokers, Dealers, Issuers, Securities.

17 CFR Part 274

Investment companies, Reporting and recordkeeping requirements, Securities.

For the reasons set forth in the preamble, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 228—INTEGRATED DISCLOSURE SYSTEM FOR SMALL BUSINESS ISSUERS

1. The authority citation for Part 228 is revised to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77jjj, 77nnn, 77sss, 78*l*, 78m, 78n, 78o, 78u–5, 78w, 78*ll*, 78mm, 80a–8, 80a–29, 80a–30, 80a–37 and 80b–11.

Section 228.307 is also issued under secs. 3(a), 302 and 404, Pub. L. No. 107–204, 116 Stat. 745.

Section 228.309 is also issued under secs. 3(a) and 407, Pub. L. No. 107–204, 116 Stat. 745.

Section 228.406 is also issued under secs. 3(a) and 406, Pub. L. No. 107–204, 116 Stat. 745.

2. Section 228.703 is added to read as follows:

§ 228.703 (Item 703) Purchases of equity securities by the small business issuer and affiliated purchasers.

(a) In the following tabular format, provide the information specified in paragraph (b) of this Item with respect to any purchase made by or on behalf of the small business issuer or any ''affiliated purchaser,'' as defined in § 240.10b–18(a)(3) of this chapter, of shares or other units of any class of the small business issuer's equity securities that is registered by the small business issuer pursuant to section 12 of the Exchange Act (15 U.S.C. 78*l*).

ISSUER PURCHASES OF EQUITY SECURITIES

Period	(a) Total number of shares (or units) purchased	(b) Average price paid per share	(c) Identity of broker-dealer(s) used to effect purchases	(d) Number of shares (or units) purchased as part of publicly announced plans or programs	(e) Maximum number (or approximate dollar value) of shares (or units) that may yet be purchased under the plans or programs
Month #1 (Identify beginning and ending dates)					

ISSUER PURCHASES OF EQUITY SECURITIES—Continued

Period	(a) Total number of shares (or units) purchased	(b) Average price paid per share	(c) Identity of broker-dealer(s) used to effect purchases	(d) Number of shares (or units) purchased as part of publicly announced plans or programs	(e) Maximum number (or approximate dollar value) of shares (or units) that may yet be purchased under the plans or programs
Month #2 (Identify beginning and ending dates)					
Month #3 (Identify beginning and ending dates)					
Total					

(b) The table shall include the following information for each class or series of securities for each month included in the period covered by the report:

(1) The total number of shares purchased (column (a));

Instruction to Paragraph (b)(1) of Item 703

Include in this column all small business issuer repurchases, including those made pursuant to publicly announced plans or programs and those not made pursuant to publicly announced plans or programs. Briefly disclose, by footnote to the table, the number of shares purchased other than through a publicly announced plan or program and the nature of the transaction. (*e.g.*, whether the purchases were made in open-market transactions, tender offers, in satisfaction of the company's obligations upon exercise of outstanding put options issued by the company, or other transactions.)

(2) The average price paid per share (column (b));

(3) The identity of any broker-dealer(s) that effected the purchases (column (c));

(4) The number of shares purchased as part of a publicly announced repurchase plan or program (column (d)); and

(5) The maximum number (or approximate dollar value) of shares (or units) that may yet be purchased under the plans or programs (column (e)).

Instruction to Paragraphs (b)(4) and (b)(5) of Item 703

(1) In the table, disclose this information in the aggregate for all plans or programs publicly announced.

(2) By footnote to the table, indicate:

(a) The date each plan or program was announced;

(b) The dollar amount (or share amount) approved;

(c) The expiration date (if any) of each plan or program;

(d) Each plan or program that has expired during the period covered by the table:

(e) Each plan or program the small business issuer has determined to terminate prior to expiration; and

(f) Each plan or program the small business issuer has not purchased under during the period covered by the table and whether the small business issuer still intends to purchase under that plan or program.

Instruction to Item 703

Disclose all purchases covered by this Item, including purchases that do not satisfy the conditions of the safe harbor of § 240.10b–18 of this chapter.

PART 229—STANDARD INSTRUCTIONS FOR FILING FORMS UNDER SECURITIES ACT OF 1933, SECURITIES EXCHANGE ACT OF 1934 AND ENERGY POLICY AND CONSERVATION ACT OF 1975—REGULATION S–K

3. The authority citation to Part 229 is revised to read as follows:

Authority: 15 U.S.C. 77e, 77f, 77g, 77h, 77j, 77k, 77s, 77z–2, 77z–3, 77aa(25), 77aa(26), 77ddd, 77eee, 77ggg, 77hhh, 77iii, 77jjj, 77nnn, 77sss, 78c, 78i, 78j, 78l, 78m, 78n, 78o, 78u–5, 78w, 78ll(d), 78mm, 79e, 79n, 79t, 80a–8, 80a–29, 80a–30, 80a–31, 80a–37, 80a–38(a), 80b–11, unless otherwise noted.

Section 229.307 is also issued under secs. 3(a), 302 and 404, Pub. L. No. 107–204, 116 Stat. 745.

Section 229.309 is also issued under secs. 3(a) and 407, Pub. L. No. 107–204, 116 Stat. 745.

Section 229.406 is also issued under secs. 3(a) and 406, Pub. L. No. 107–204, 116 Stat. 745.

Section 229.601 is also issued under secs. 3(a) and 406, Pub. L. No. 107–204, 116 Stat. 745.

4. Section 229.703 is added to read as follows:

§ 229.703 (Item 703) Purchases of equity securities by the issuer and affiliated purchasers.

(a) In the following tabular format, provide the information specified in paragraph (b) of this Item with respect to any purchase made by or on behalf of the issuer or any ''affiliated purchaser,'' as defined in § 240.10b–18(a)(3) of this chapter, of shares or other units of any class of the issuer's equity securities that is registered by the issuer pursuant to section 12 of the Exchange Act (15 U.S.C. 78*l*).

ISSUER PURCHASES OF EQUITY SECURITIES

Period	(a) Total number of shares (or units) purchased	(b) Average price paid per share	(c) Identity of broker-dealer(s) used to effect purchases	(d) Number of shares (or units) purchased as part of publicly announced plans or programs	(e) Maximum number (or approximate dollar value) of shares (or units) that may yet be purchased under the plans or programs
Month #1 (Identify beginning and ending dates)					

ISSUER PURCHASES OF EQUITY SECURITIES—Continued

Period	(a) Total number of shares (or units) purchased	(b) Average price paid per share	(c) Identity of broker-dealer(s) used to effect purchases	(d) Number of shares (or units) purchased as part of publicly announced plans or programs	(e) Maximum number (or approximate dollar value) of shares (or units) that may yet be purchased under the plans or programs
Month #2 (Identify beginning and ending dates)					
Month #3 (Identify beginning and ending dates)					
Total					

(b) The table shall include the following information for each class or series of securities for each month included in the period covered by the report:

(1) The total number of shares purchased (column (a));

Instructions to Paragraph (b)(1) of Item 703

Include in this column all issuer repurchases, including those made pursuant to publicly announced plans or programs and those not made pursuant to publicly announced plans or programs. Briefly disclose, by footnote to the table, the number of shares purchased other than through a publicly announced plan or program and the nature of the transaction. (*e.g.*, whether the purchases were made in open-market transactions, tender offers, in satisfaction of the company's obligations upon exercise of outstanding put options issued by the company, or other transactions).

(2) The average price paid per share (column (b));

(3) The identity of any broker-dealer(s) that effected the purchases (column (c));

(4) The number of shares purchased as part of a publicly announced repurchase plan or program (column (d)); and

(5) The maximum number (or approximate dollar value) of shares (or units) that may yet be purchased under the plans or programs (column (e)).

Instructions to Paragraphs (b)(4) and (b)(5) of Item 703

(1) In the table, disclose this information in the aggregate for all plans or programs publicly announced.

(2) By footnote to the table, indicate:

(a) The date each plan or program was announced;

(b) The dollar amount (or share amount) approved;

(c) The expiration date (if any) of each plan or program;

(d) Each plan or program that has expired during the period covered by the table;

(e) Each plan or program the issuer has determined to terminate prior to expiration; and

(f) Each plan or program the issuer has not purchased under during the period covered by the table and whether the issuer still intends to purchase under that plan or program.

Instruction to Item 703

Disclose all purchases covered by this item, including purchases that do not satisfy the conditions of the safe harbor of § 240.10b–18 of this chapter.

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

5. The authority citation for Part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78o, 78p, 78q, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 79q, 79t, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4 and 80b–11, unless otherwise noted.

* * * * *

6. Section 240.10b–18 is revised to read as follows:

§ 240.10b–18 Purchases of certain equity securities by the issuer and others.

Preliminary Notes to § 240.10b–18

1. Section 240.10b–18 provides issuers (and their affiliated purchasers) with a ''safe harbor'' from liability for manipulation under the Act when they repurchase shares of the issuer's common stock in the market in accordance with the section's manner, timing, price, and volume conditions. As a safe harbor, compliance with § 240.10b–18 is voluntary. To come within the safe harbor, however, an issuer's repurchases must satisfy (on a daily basis) each of the section's four conditions. Failure to meet any one of the four conditions will remove all of the issuer's repurchases from the safe harbor for that day. The safe harbor, however, is not available for repurchases that, although made in technical compliance with the section, are part of a plan or scheme to evade the federal securities laws.

2. Regardless of whether the repurchases are effected in accordance with § 240.10b–18, reporting issuers must comply with Item 703 of Regulations S–K and S–B (17 CFR 229.703 and 228.703) and Item 15(e) of Form 20–F (17 CFR 249.220f) (regarding foreign private issuers), and closed-end management investment companies that are registered under the Investment Company Act of 1940 must comply with Item 6 of Form N–CSR (17 CFR 249.331; 17 CFR 274.128). Items 703, 15(e), and 6 require issuers to disclose, on Forms 10–Q/10–QSB, 10–K/10–KSB, 20–F, and Form N–CSR, all repurchases (open market and private transactions) of their equity securities during the previous quarter, including the total number of shares (or units) purchased (sorted by month), the average price paid per share, the identity of broker-dealer(s) used to effect the purchases (except in the case of Form 20–F), the number of shares (or units) purchased as part of a publicly announced repurchase plan or program, and the maximum number (or approximate dollar value) of shares (or units) that may yet be purchased under the plans or programs.

(a) *Definitions.* Unless the context otherwise requires, all terms used in this section shall have the same meaning as in the Act. In addition, the following definitions shall apply:

(1) *ADTV* means the average daily trading volume reported for the security during the four calendar weeks preceding the week in which the Rule 10b–18 purchase is to be effected.

(2) *Affiliate* means any person that directly or indirectly controls, is controlled by, or is under common control with, the issuer.

(3) *Affiliated purchaser* means:

(i) A person acting, directly or indirectly, in concert with the issuer for the purpose of acquiring the issuer's securities; or

(ii) 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; *Provided*, *however*, that ''affiliated purchaser'' shall not include a broker, dealer, or other person solely by reason of such broker, dealer, or other person

effecting rule 10b–18 purchases on behalf of the issuer or for its account, and shall not include an officer or director of the issuer solely by reason of that officer or director's participation in the decision to authorize Rule 10b–18 purchases by or on behalf of the issuer.

(4) *Agent independent of the issuer* has the meaning contained in § 242.100 of this chapter.

(5) *Consolidated system* means a consolidated transaction (or quotation) reporting system that collects and publicly disseminates on a current and continuous basis transaction (or quotation) information in common equity securities pursuant to an effective transaction reporting plan (as defined in § 240.11Aa3–1 of this chapter), the rules of a national securities exchange, or the rules of a national securities association.

(6) *Highest independent bid* means the highest published bid for a regular way trade (other than a bid by or for the issuer or any affiliated purchaser of the issuer) at the time the Rule 10b–18 purchase is effected.

(7) *Last independent transaction price* means the price at which the last regular way trade (other than a trade by or for the issuer or any affiliated purchaser of the issuer) was reported at the time the Rule 10b–18 purchase is effected.

(8) *Market-wide trading suspension* means a market-wide trading halt of 30 minutes or more that is:

(i) Imposed pursuant to the rules of a national securities exchange or a national securities association in response to a market-wide decline during a single trading session; or

(ii) Declared by the Commission pursuant to its authority under section 12(k) of the Act (15 U.S.C. 78(k)).

(9) *Plan* has the meaning contained in § 242.100 of this chapter.

(10) *Principal market* for a security means the single securities market with the largest reported trading volume for the security during the 6 full calendar months preceding the week in which the Rule 10b–18 purchase is to be effected.

(11) *Public float value* has the meaning contained in § 242.100 of this chapter.

(12) *Purchase price* means the price paid per share as reported (exclusive of any commission paid to a broker acting as agent, or commission equivalent, mark-up, or differential paid to a dealer).

(13) *Rule 10b–18 purchase* means a purchase (or any bid or limit order that would effect such purchase) of an issuer's common stock (or an equivalent interest, including a unit of beneficial interest in a trust or limited partnership or a depository share) by or for the issuer or any affiliated purchaser. However, it does *not* include any purchase of such security:

(i) Effected during the restricted period (as specified in § 242.102 of this chapter) when the issuer or any affiliated purchaser is distributing (as defined in § 242.100 of this chapter) the issuer's common stock or any other security for which the common stock is a reference security;

(ii) Effected by or for an issuer plan by an agent independent of the issuer;

(iii) Effected as a fractional share purchase (a fractional interest in a security) evidenced by a script certificate, order form, or similar document;

(iv) Effected during the period from the time of public announcement of a merger, acquisition, or similar transaction involving a recapitalization, until the completion of such transaction;

(v) Effected pursuant to § 240.13e–1;

(vi) Effected pursuant to a tender offer that is subject to § 240.13e–4 or specifically excepted from § 240.13e–4; or

(vii) Effected pursuant to a tender offer that is subject to section 14(d) of the Act (15 U.S.C. 78n(d)) and the rules and regulations thereunder.

(b) *Conditions to be met.* Rule 10b–18 purchases shall not be deemed to have violated the anti-manipulation provisions of sections 9(a)(2) or 10(b) of the Act (15 U.S.C. 78i(a)(2) or 78j(b)), or § 240.10b–5 under the Act, solely by reason of the time, price, or amount of the Rule 10b–18 purchases, or the number of brokers or dealers used in connection with such purchases, if the issuer or affiliated purchaser of the issuer effects the Rule 10b–18 purchases according to each of the following conditions:

(1) *One broker or dealer.* Rule 10b–18 purchases must be made from or through only one broker or dealer on any single day; *Provided*, *however*, that:

(i) The ''one broker or dealer'' condition shall not apply to Rule 10b–18 purchases that are not solicited by or on behalf of the issuer or its affiliated purchaser(s); and

(ii) Where Rule 10b–18 purchases are made by or on behalf of more than one affiliated purchaser of the issuer (or the issuer and one or more of its affiliated purchasers) on a single day, the issuer and all affiliated purchasers must use the same broker or dealer.

(2) *Time of purchases.* (i) Rule 10b–18 purchases must not be the first (opening regular way purchase reported in the consolidated system; and

(ii) Rule 10b–18 purchases of an issuer's security that has an ADTV value of $1 million or more and a public float value of $150 million or more must not be effected during any of the following periods:

(A) The 10 minutes before the scheduled close of the primary trading session in the principal market for the security;

(B) The 10 minutes before the scheduled close of the primary trading session in the market where the purchase is made; or

(C) After the termination of the period in which last sale prices are reported in the consolidated system; and

(iii) Rule 10b–18 purchases of an issuer's security that does not meet the criteria described in paragraph (b)(2)(ii) of this section must not be effected during any of the following periods:

(A) The 30 minutes before the scheduled close of the primary trading session in the principal market for the security;

(B) The 30 minutes before the scheduled close of the primary trading session in the market where the purchase is made, or

(C) After the termination of the period in which last sale prices are reported in the consolidated system.

(3) *Price of purchases.* (i) Rule 10b–18 purchases must be effected at a purchase price that does not exceed the highest independent bid or the last independent transaction price, whichever is higher, quoted or reported in the consolidated system; and

(ii) For securities as to which bids and transaction prices are not quoted or reported in the consolidated system, Rule 10b–18 purchases must be effected at a purchase price that does not exceed the highest independent bid or the last independent transaction price, whichever is higher, displayed and disseminated on any national securities exchange or on any inter-dealer quotation system (as defined in § 240.15c2–11) that displays at least two priced quotations for the security. For all other securities, Rule 10b–18 purchases must be effected at a price no higher than the highest independent bid obtained from three dealers.

(4) *Volume of purchases.* The total volume of Rule 10b–18 purchases (combining all Rule 10b–18 purchases by or for the issuer or any affiliated purchaser of the issuer for that day) effected on any single day must not exceed the higher of 25 percent of the ADTV for that security or 500 shares.

(c) *Alternative conditions.* The conditions of paragraph (b) of this section shall apply in connection with a Rule 10b–18 purchase effected during a trading session following the

imposition of a market-wide trading suspension, except:

(1) That the time of purchases condition in paragraph (b)(2) of this section shall not apply, either:

(i) From the reopening of trading until the scheduled close of trading; or

(ii) At the opening of trading on the next trading day until the scheduled close of trading that day, if a market-wide trading suspension was in effect at the close of trading on the preceding day; and

(2) The volume of purchases condition in paragraph (b)(4) of this section is modified so that the amount of Rule 10b–18 purchases must not exceed 100 percent of the ADTV for that security.

(d) *Other purchases.* Failure to meet any one of the Rule's conditions with respect to any Rule 10b–18 purchase will remove from the safe harbor all other Rule 10b–18 purchases for that day. However, no presumption shall arise that an issuer or an affiliated purchaser has violated the anti-manipulation provisions of sections 9(a)(2) or 10(b) of the Act (15 U.S.C. 78i(a)(2) or 78j(b)), or § 240.10b–5, if the Rule 10b–18 purchases of such issuer or affiliated purchaser do not meet the conditions specified in paragraph (b) or (c) of this section.

PART 249—FORMS, SECURITIES EXCHANGE ACT OF 1934

7. The authority citation for part 249 is revised to read as follows:

Authority: 15 U.S.C. 78a, *et seq.*, unless otherwise noted.

Section 249.220f is also issued under 15 U.S.C. 78m, 78w(a), and secs. 3(a), 302, 404 and 407, Pub. L. No. 107–204, 116 Stat. 745.

Section 249.240f is also issued under secs. 3(a), 302, 404 and 407, Pub. L. No. 107–204, 116 Stat. 745.

Section 249.308 is also issued under 15 U.S.C. 80a–29 and secs. 3(a), 302 and 404, Pub. L. No. 107–204, 116 Stat. 745.

Section 249.308a is also issued under secs. 3(a), 302 and 404, Pub. L. No. 107–204, 116 Stat. 745.

Section 249.308b is also issued under secs. 3(a), 302 and 404, Pub. L. No. 107–204, 116 Stat. 745.

Section 249.310 is also issued under secs. 3(a), 302, 404 and 407, Pub. L. No. 107–204, 116 Stat. 745.

Section 249.310b is also issued under secs. 3(a), 302, 404 and 407, Pub. L. No. 107–204, 116 Stat. 745.

Section 249.326(T) is also issued under 15 U.S.C. 78m(f)(1).

Section 249.330 is also issued under secs. 3(a), 302, 406, and 407, Pub. L. No. 107–204, 116 Stat. 745.

Section 249.331 is also issued under secs. 3(a), 302, 406, and 407, Pub. L. No. 107–204, 116 Stat. 745.

8. Amend Form 20–F, part I (referenced in § 249.220f) by adding Item 15(e) to read as follows:

Note: The text of Form 20–F does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 20–F

* * * * *

Part I

* * * * *

Item 15(e) Purchases of Equity Securities by the Issuer and Affiliated Purchasers

(1) In the following tabular format, provide the information specified in paragraph (2) of this Item with respect to any purchase made by or on behalf of the issuer or any ''affiliated purchaser,'' as defined in § 240.10b–18(a)(3), of shares or other units of any class of the issuer's equity securities that is registered by the issuer pursuant to section 12 of the Exchange Act (15 U.S.C. 78*l*).

ISSUER PURCHASES OF EQUITY SECURITIES

Period	(a) Total number of shares (or units) purchased	(b) Average price paid per share	(c) Number of shares (or units) purchased as part of a publicly announced plan or program	(d) Maximum number (or approximate dollar value) of shares (or units that may yet be purchased under the plans or programs
Month #1				
Month #2				
Month #3				
Total				

(2) The table shall include the following information for each class or series of securities for each month included in the period covered by the report:

(A) The total number of shares purchased (column (a)).

(B) The average price paid per share (column (b)).

(C) The number of shares purchased as part of a publicly announced repurchase plan or program (column (c)).

(D) The maximum number (or approximate dollar value) of shares (or units) that may yet be purchased under the plans or programs (column (d)).

Instruction to Item 15(e)

Disclose all purchases covered by this item, including purchases that do not satisfy the conditions of the safe harbor of § 240.10b–18.

Instruction to Paragraph (2)(A) of Item 15(e)

Including in this column all issuer repurchases, including those made pursuant to publicly announced plans or programs and those not made pursuant to publicly announced plans or programs. Briefly disclose, by footnote to the table, the number of shares purchased other than through a publicly announced plan or program and the nature of the transaction (*e.g.*, whether the purchases were made in open-market transactions, tender offers, in satisfaction of the company's obligations upon exercise of outstanding put options issued by the company, or other transactions).

Instruction to Paragraphs (2)(C) and (2)(D) of Item 15(e)

1 In the table, disclose this information in the aggregate for all plans or programs publicly announced.

2 By footnote to the table, indicate:

(a) The date each plan or program was announced;

(b) The dollar amount (or share amount) approved;

(c) The expiration date (if any) of each plan or program;

(d) Each plan or program that has expired during the period covered by the table;

(e) Each plan or program the issuer has determined to terminate prior to expiration; and

(f) Each plan or program the issuer has not purchased under during the period covered by the table and whether the issuer still intends to purchase under that plan or program.

* * * * *

9. Amend Form 10–Q (referenced in § 249.308a) by:

a. Revising the heading for Item 2 in Part II;

b. Designating the existing paragraph in Item 2 as paragraph (a); and

c. Adding paragraph (b).

The addition and revision reads as follows:

Note: The text of Form 10–Q does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10–Q

* * * * *

Part II—Other Information

* * * * *

Item 2. Use of Proceeds and Issuer Purchases of Equity Securities.

* * * * *

(b) Furnish the information required by Item 703 of Regulation S–K (§ 229.703 of this chapter) for any repurchase made in the quarter covered by the report. Provide disclosures on a rolling-monthly basis. For example, if the quarter began on January 15 and ended on April 15, the charge would show repurchases for the months from January 15 through February 14, February 15 through March 14, and March 15 through April 15.

* * * * *

10. Amend Form 10–QSB (referenced in § 249.308b) by:

a. Revising the heading for Item 2 in Part II;

b. Designating the existing paragraph in Item 2 as paragraph (a); and

c. Adding paragraph (b).

The revision and addition reads as follows.

Note: The text of Form 10–QSB does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10–QSB

* * * * *

Part II—Other Information

* * * * *

Item 2. Use of Proceeds and Small Business Issuer Purchases of Equity Securities

* * * * *

(b) Furnish the information required by Item 703 of Regulation S–B (§ 228.703 of this chapter) for any repurchase made in the quarter covered by the report. Provide disclosures on a rolling-monthly basis. For example, if the quarter began on January 15 and ended on April 15, the charge would show repurchases for the months from January 15 through February 14, February 15 through March 14, and March 15 through April 15.

* * * * *

11. Amend Form 10–K (referenced in § 249.310) by revising the heading for Item 5 in Part II by revising the caption and by adding paragraph (c) to read as follows:

Note: The text of Form 10–K does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10–K

* * * * *

Part II

* * * * *

Item 5. Market for Registrant's Common Equity, Related Stockholder Matters and Issuer Purchases of Equity Securities

* * * * *

(c) Furnish the information required by Item 703 of Regulation S–K (§ 229.703 of this chapter) for any repurchase made in a month within the fourth quarter of the fiscal year covered by the report. Provide disclosures covering repurchases made on a rolling-monthly basis. For example, if the fourth quarter began on January 15 and ended on April 15, the chart would show repurchases for the months from January 15 through February 14, February 15 through March 14, and March 15 through April 15.

* * * * *

12. Amend Form 10–KSB (referenced in § 249.310b) by revising the heading for Item 5 in Part II and by adding paragraph (c) to read as follows:

Note: The text of Form 10–KSB does not, and this amendment will not, appear in the Code of Federal Regulations.

Form 10–KSB

* * * * *

Part II

* * * * *

Item 5. Market for Common Equity, Related Stockholder Matters and Small Business Issuer Purchases of Equity Securities

* * * * *

(c) Furnish the information required by Item 703 of Regulation S–B (§ 228.703 of this chapter) for any repurchase made in a month within the fourth quarter of the fiscal year covered by the report. Provide disclosures covering repurchases made on a rolling-monthly basis. For example, if the fourth quarter began on January 15 and ended on April 15, the chart would show repurchases for the months from January 15 through February 14, February 15 through March 14, and March 15 through April 15.

* * * * *

PART 274—FORMS PRESCRIBED UNDER THE INVESTMENT COMPANY ACT OF 1940

13. The authority citation for part 274 is amended by adding the following citations to read as follows:

Authority: 15 U.S.C. 77f, 77g, 77h, 77j, 77s, 78c(b), 78*l*, 78m, 78n, 78o(d), 80a–8, 80a–24, 80a–26, and 80a–29, unless otherwise noted.

Section 274.101 is also issued under secs. 3(a), 302, Pub. L. No. 107–204, 116 Stat. 745.

Section 274.128 is also issued under secs. 3(a), 302, Pub. L. No. 107–204, 116 Stat. 745.

14. Form N–CSR (referenced in §§ 249.331 and 274.128) is amended by:

a. Redesignating Items 6 and 7 as Items 7 and 8;

b. Removing ''Item 7(b)'' from General Instruction D and in its place adding ''Item 7(b)'';

c. Removing ''Item 6(a)'' from Instruction to Item 3(a) and Instruction 1 to Item 4 and in its place adding ''Item 8(a)''; and

d. Adding a new Item 6 to read as follows:

Note: The text of Form N–CSR does not, and its amendment will not, appear in the Code of Federal Regulations.

Form N–CSR

* * * * *

Item 6. Purchases of Equity Securities by Closed-End Management Investment Company and Affiliated Purchasers

(a) If the registrant is a closed-end management investment company, in the following tabular format, provide the information specified in paragraph (b) of this Item with respect to any purchase made by or on behalf of the registrant or any ''affiliated purchaser,'' as defined in Rule 10b–18(a)(3) under the Securities Exchange Act of 1934 (17 CFR 240.10b–18(a)(3)), of shares or other units of any class of the registrant's equity securities that is registered by the registrant pursuant to section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*).

REGISTRANT PURCHASES OF EQUITY SECURITIES

Period	(a) Total number of shares (or units) purchased	(b) Average price per share (or unit)	(c) Identity of broker-dealer(s) used to effect purchases	(d) Number of shares (or units) purchased as part of publicly announced plans or programs	(e) Maximum number (or approximate dollare value) of shares (or units) that may yet be purchased under the plans or programs
Month #1 (Identify beginning and ending dates)					

REGISTRANT PURCHASES OF EQUITY SECURITIES—Continued

Period	(a) Total number of shares (or units) purchased	(b) Average price per share (or unit)	(c) Identity of broker-dealer(s) used to effect purchases	(d) Number of shares (or units) purchased as part of publicly announced plans or programs	(e) Maximum number (or approximate dollare value) of shares (or units) that may yet be purchased under the plans or programs
Month #2 (Identify beginning and ending dates)					
Month #3 (Identify beginning and ending dates)					
Month #4 (Identify beginning and ending dates)					
Month #5 (Identify beginning and ending dates)					
Month #6 (Identify beginning and ending dates)					
Total					

(b) The table shall include the following information for each class or series of securities for each month included in the period covered by the report.

(1) The total number of shares purchased (column (a)).

(2) The average price paid per share (column (b)).

(3) The identity of any broker-dealer(s) that effected the purchases (column (c)).

(4) The number of shares purchased as part of a publicly announced repurchase plan or program (column (d)).

(5) The maximum number (or approximate dollar value) of shares (or units) that may yet be purchased under the plans or programs (column (e)).

General Instruction

Disclose all purchases covered by this Item, including purchases that do not satisfy the conditions of the safe harbor of Rule 10b–18 under the Securities Exchange Act of 1934 (17 CFR 240.10b–18), made in the period covered by the report.

Instruction to paragraph (b)(1). Include in this column all repurchases by the registrant, including those made pursuant to publicly announced plans or programs and those not made pursuant to publicly announced plans or programs. Briefly disclose, by footnote to the table, the number of shares purchased other than through a publicly announced plan or program and the nature of the transaction (e.g., whether the purchases were made in open-market transactions, tender offers, in satisfaction of the registrant's obligations upon exercise of outstanding put options issued by the registrant, or other transactions.)

Instruction to Paragraphs (b)(4) and (b)(5)

1 In the table, disclose this information in the aggregate for all plans or programs publicly announced.

2 By footnote to the table, indicate:

a. The date each plan or program was announced;

b. The dollar amount (or share amount) approved;

c. The expiration date (if any) of each plan or program;

d. Each plan or program that has expired during the period covered by the table;

e. Each plan or program the registrant has determined to terminate prior to expiration; and

f. Each plan or program the registrant has not purchased under during the period covered by the table and whether the registrant still intends to purchase under that plan or program.

* * * * *

Dated: December 10, 2002.

By the Commission.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 02–31656 Filed 12–17–02; 8:45 am]

BILLING CODE 8010–01–P