

September 19, 2008

SEC Emergency Order on Issuer Repurchases

Temporary Emergency Order Eases Timing and Volume Conditions of Exchange Act Rule 10b-18

The Securities and Exchange Commission ("SEC") has issued an emergency order, effective 12:01 a.m. EDT today, September 19, 2008, easing the timing and volume conditions to the safe harbor provided by Exchange Act Rule 10b-18 to allow issuers greater flexibility in repurchasing their own common stock. This order was issued with two other temporary emergency orders, one prohibiting most short sales in the publicly-traded shares of certain financial firms, and the second requiring certain institutional investment managers to report information concerning daily short sales.

Rule 10b-18 provides issuers that repurchase their common stock in the open market with a safe harbor from liability for manipulation, if the repurchases comply with specific manner, timing, price and volume limitations. The Rule does not, however, relieve an issuer of any duty it may have to disclose material, non-public information in connection with a repurchase.

In the release on Rule 10b-18, the SEC explained that it was aware of the continued potential of sudden and excessive fluctuations of securities prices and disruption in the functioning of the securities markets that could threaten fair and orderly markets. The SEC further stated that it had become concerned about sudden and unexplained declines in the prices of securities, which can create a crisis of confidence without a fundamental underlying basis, and thus impair the liquidity and ultimate viability of an issuer, with potentially broad market consequences. The release states that the SEC has determined that issuer repurchases can represent an important source of liquidity during times of market volatility. The

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emergency order provides additional flexibility and certainty to issuers that have been reluctant to undertake repurchases outside of the safe harbor.

The emergency order provides two temporary exceptions to the conditions of Rule 10b-18. The first exception suspends the time of purchase restrictions in Rule 10b-18(b)(2)(i), (ii) and (iii). Those paragraphs provide that Rule 10b-18 is not available for purchases that are:

- The opening (regular way) purchase reported in the consolidated system;
- Effected during the 10 minutes before the scheduled close of the primary trading session in the principal market for the security, and the 10 minutes before the scheduled close of the primary trading session in the market where the purchase is effected, for a security that has an ADTV¹ of \$1 million or more and a public float of \$150 million or more; and
- For all other securities, effected during the 30 minutes before the scheduled close of the primary trading session in the principal market for the security, and the 30 minutes before the scheduled close of the primary trading session in the market where the purchase is effected.

While the emergency order is in effect, purchases occurring in those time periods will be eligible for the safe harbor if the other conditions in the rule are satisfied.

The second exception modifies the volume condition in paragraph (b)(4) of the Rule. The order permits the volume of Rule 10b-18 purchases in any one day to be as much as 100% of the ADTV. This is an increase from the 25% limitation provided in paragraph (b)(4).

The emergency order (SEC Release No. 34-58588 (Sept. 18, 2008)) provides that it will terminate at 11:59 p.m. on October 2, 2008 unless further extended by the SEC. For a discussion of the emergency orders regarding short sales, please ask for our publication entitled "SEC Takes Temporary Action to Prohibit Most Short Sales in the Publicly-Traded Shares of Certain Financial Firms and to Require Certain Institutional Investment Managers to Report Information Concerning Daily Short Sales."

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¹ As used in Rule 10b-18, "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.

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