



April 9, 2010

By Electronic Mail (rule-comments@sec.gov)

Ms. Elizabeth M. Murphy
Secretary
Securities and Exchange Commission
100 F Street, NE
Washington, DC 20549-1090

Re: Purchases of Certain Equity Securities by the Issuer and Others: Release No. 34-61414;
File No. S7-04-10

Dear Ms. Murphy:

The Securities Industry and Financial Markets Association (“SIFMA”)¹ appreciates the opportunity to comment on the Securities and Exchange Commission’s (“SEC’s” or “Commission’s”) recently proposed amendments to Rule 10b-18 (the “Rule” or the “Safe Harbor”).² The Rule provides issuers a safe harbor from liability for manipulation when they repurchase their securities in accordance with the Rule’s manner, timing, price and volume limitations. The Commission has long recognized that there are many legitimate business reasons that may motivate an issuer to repurchase its securities.³ These reasons include, among others, to fund dividend reinvestment, stock option and employee stock ownership plans, or to provide liquidity to the marketplace.

The Commission proposes to modify the Rule in several ways in light of recent changes to the securities markets. In particular, the adoption of Regulation NMS has significantly increased quote traffic – technology has advanced to the point where it is common for messages to travel from one destination to another in microseconds, and the quotations of more liquid

¹ SIFMA brings together the shared interests of hundreds of securities firms, banks and asset managers. SIFMA’s mission is to support a strong financial industry, investor opportunity, capital formation, job creation and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (“GFMA”). For more information, visit www.sifma.org.

² Securities Exchange Act of 1934 (the “Exchange Act”) Rel. No. 61414 (Jan. 26, 2010), 75 Fed. Reg. 4713 (Jan. 29, 2010) (the “Proposal”).

³ See Proposal at 4713.

securities routinely flicker multiple times within any given second.⁴ These developments have made compliance with the Safe Harbor more difficult for issuers and broker-dealers executing Rule 10b-18 repurchases.

In response to these developments and other concerns, the Commission proposes to (1) limit the disqualification provision of the Rule so that not all Rule 10b-18 repurchases are deemed outside the Safe Harbor where an issuer enters a repurchase order in compliance with the Safe Harbor, but the order is executed immediately thereafter outside of the price condition solely due to flickering quotes;⁵ (2) modify the Rule's timing condition to preclude repurchases made pursuant to the Rule as the opening purchase in the principal market for the security and in the market where the purchase is effected;⁶ (3) except certain volume-weighted average price ("VWAP") transactions from the pricing condition of the Rule;⁷ and (4) extend the time in which the Safe Harbor is unavailable in connection with special purpose acquisition companies ("SPACs").⁸ The Commission also is considering whether to except other passive pricing mechanisms from the Rule's pricing condition.⁹

SIFMA concurs that the ability of issuers to conduct repurchases under the Safe Harbor has been hindered by market developments, and commends the SEC for proposing amendments to modernize the Safe Harbor in light of these changes. Generally, our comments on the Proposal are as follows:

- Flickering Quotes: SIFMA appreciates the proposed changes to the disqualification provision of the Preliminary Note of Rule 10b-18. However, SIFMA believes that the Safe Harbor could be amended to address this problem more directly, and more effectively, if compliance with the price condition were tied to the time that a Rule 10b-18 order is *entered* for execution, as opposed to when it is actually executed.
- Timing Condition: SIFMA recognizes the SEC's concerns about issuer repurchases conducted at market open. However, we believe the Commission's focus should be on issuer repurchases prior to the open of trading on the Primary Market (as defined below) for an issuer's common stock. Once a transaction has occurred in the Primary Market, issuers should be permitted to effect repurchases under the Safe Harbor in any other market – even if such purchases constitute opening transactions on such other markets.
- Price Condition: SIFMA supports the proposed changes to except issuer VWAP trades from the pricing condition of Rule 10b-18, and also believes that the SEC should except repurchases conducted via passive pricing systems from that condition of the Rule. SIFMA believes, however, that the SEC should modify these proposed exceptions to make them more useful to issuers. Specifically, the SEC should (a) expand the volume limitation of the

⁴ See Exchange Act Rel. No. 61358 at 41 (Jan. 14, 2010), 75 Fed. Reg. 3594, 3605 (Jan. 21, 2010).

⁵ Proposal at 4720.

⁶ Proposal at 4715.

⁷ Proposal at 4717.

⁸ Proposal at 4721.

⁹ See Proposal at 4718.

proposed VWAP exception, (b) confirm that the VWAP exception is intended to include full-day guaranteed VWAP transactions and (c) allow flexibility in the calculation of VWAP to allow market participants to determine meaningful volume-weighted reference prices (e.g., allow issuers to (i) use a VWAP calculated price based either on the consolidated tape or Primary Market transactions and (ii) exclude the following types of trades from the VWAP calculation: block-sized transactions that are privately-negotiated and which otherwise would skew the VWAP, and those trades reported with modifiers indicating that they are priced in a manner unrelated to the market at the time of execution).

These views and other responses to the SEC's requests for comment are more fully discussed below.

I. Discussion

A. Flickering Quotes

The Commission proposes to amend the Preliminary Note of the Rule to limit its disqualification provision where an issuer's repurchase order is entered in accordance with the Rule's four conditions but is, immediately thereafter, executed outside the price condition solely due to flickering quotes.¹⁰ Under the current Rule, the failure of any of an issuer's repurchases of common stock in the market to meet any of the four conditions of the Rule disqualifies all of the issuer's other Rule 10b-18 repurchases for that day. Under the Proposal, in instances in which an issuer's repurchase order is entered in accordance with the Rule's four conditions but is immediately thereafter executed outside of the price condition due to flickering quotes, only the non-compliant repurchase, rather than all of the issuer's other Rule 10b-18 repurchases for that day, would be disqualified from the Safe Harbor.¹¹

SIFMA believes that compliance with the Safe Harbor should be determined based on the time that an order is *entered* into a system for execution rather than the time that the order is actually executed. Fundamentally, a repurchase order entered in compliance with the four conditions of the Rule, including the price condition, belies any notion that the issuer intended to engage in manipulative activity. In addition, tying compliance with the price condition of the Rule to order entry would be consistent with the Commission's recognition in other regulations of the difficulty of meeting quotation and/or price-based tests in light of the pace of message traffic in today's markets. For example, trading centers complying with the Order Protection Rule (the "OPR") – Rule 611 of Regulation NMS of the Exchange Act – are permitted to route intermarket sweep orders ("ISOs") based on the market data that they see at the time they enter the order for routing to another trading center and the receiving trading center is permitted to execute ISOs regardless of how the market may have changed while the order was being transmitted. The SEC staff also has recognized the difficulty faced by trading centers manually executing orders when seeking to comply with the OPR. In particular, in light of the difficulty of capturing agreed upon prices in a timely manner in today's markets, the SEC staff has noted that

¹⁰ Proposal at 4730.

¹¹ *Id.*

a broker-dealer executing an agency block transaction may evidence compliance with the OPR by demonstrating that the transaction price was at or within the best protected quotations at some point during the twenty second period up to and including the time that the transaction terms are captured in the broker-dealer's automated system.¹² Regulation NMS also provides a one second exception to address false indications of trade-throughs that are attributable to rapidly moving quotations.¹³ SIFMA believes that a similar exception for flickering quotations would be useful in the context of Rule 10b-18 repurchases. To facilitate compliance, the Commission could require firms to have written policies and procedures in place addressing the entry of Rule 10b-18 repurchase orders.

B. Time of Repurchases

The SEC also proposes to modify the Rule's timing condition to preclude Rule 10b-18 repurchases as the opening purchase in the principal market for the security, as well as in the market where the purchase is effected.¹⁴ Currently, an issuer's repurchase may not be the opening regular way purchase reported in the consolidated system, which means that an issuer's repurchase could be the opening price in the principal market (or any other market) for the security if there already has been an opening purchase reported in the consolidated system that day.

SIFMA believes that Rule 10b-18 should be modified to provide greater clarity with respect to the timing of Safe Harbor repurchases. Rule 10b-18 defines the term "principal market" as the market with the largest trade volume over the preceding six calendar months. Because liquidity can shift over time, it may be difficult to determine which market is the principal market for each issuer. To avoid confusion, SIFMA suggests that the Commission modify the Rule to use the term "Primary Market." The "Primary Market" would refer to the market selected by the issuer for the listing of its common stock. This approach is consistent with the newly adopted amendments to Regulation SHO which require the "listing market" for an issuer to determine when the price of an issuer's security has declined such that the alternative uptick rule should be triggered, thus implicitly acknowledging the importance of the listing market with respect to the pricing of an issuer's securities.¹⁵

SIFMA recognizes the Commission's concerns over Rule 10b-18 repurchases at the outset of trading. However, we believe the Commission should adopt a less restrictive timing condition than the current proposal. Specifically, the Commission should prohibit all Safe Harbor repurchases until an opening purchase in the Primary Market has been effected.

¹² See Question 3.23: Agency Block Transactions with Non-Trade-Through Prices that are Individually Negotiated: Division of Trading and Markets: Answers to Frequently Asked Questions Concerning Rule 611 and Rule 610 of Regulation NMS, *available at* <http://www.sec.gov/divisions/marketreg/nmsfaq610-11.htm#sec3>.

¹³ Specifically, a trading center may execute orders even if there are superior protected quotations in another market if the trading center claiming a trade-through of its protected quotation displayed, within one second prior to the execution of the trade-through, a best bid or offer for the NMS stock with a price that was equal or inferior to the price of the trade-through transaction. See Exchange Act Rule 611(b)(8), 17 C.F.R. § 242.611(b)(8).

¹⁴ Proposal at 4715.

¹⁵ See Exchange Act Rel. No. 61595 at 114 (Feb. 26, 2010), 75 Fed. Reg. 11232, 11264 (Mar. 10, 2010) (the "2010 Amendments to Regulation SHO").

However, once a Primary Market transaction has been effected, issuers and broker-dealers ought to be able to effect repurchases within the Safe Harbor on any other market, regardless of whether such transactions constitute the opening transactions on such markets. Notwithstanding shifts in trading volume from time to time, the Primary Market is typically the market that affects the opening crossing sessions for most common stock and, therefore, we believe that it is viewed as a significant indicator of the direction of trading for a security. Thus, once a Primary Market trade has been reported, we see little need for further restricting the ability of issuers to effect trades under the Safe Harbor.

We also note that, if the Commission adopts the Safe Harbor as proposed, it may be difficult for broker-dealers to comply with the Rule. For instance, it is difficult for a broker-dealer to ensure that it is not effecting the opening print in a market that does not have an opening cross mechanism, such as a non-listing exchange. Under the proposal, the Commission also should consider the extent to which repurchase orders properly routed to a market at the open (i.e., after an opening trade by the market) may nevertheless be re-routed by that market to another market that has not yet effected its opening trade for the stock in order to comply with the OPR of Regulation NMS. In such instances, the broker-dealer that routed the order in compliance with the timing condition of the Rule should not be deemed to have violated the Safe Harbor because of the receiving market's subsequent re-routing of the order to comply with the OPR.

C. Price of Repurchases – VWAP Transactions

The Commission proposes to except Rule 10b-18 repurchases effected on a VWAP basis from the price condition, provided certain criteria are met.¹⁶ SIFMA supports the SEC's proposal to exclude such repurchases from the price condition of Rule 10b-18. However, we wish to note below our understanding of the impact of these changes and offer, in some cases, certain modifications that we believe should be made to the Proposal.

First, the Commission should expand the ten percent (10%) volume limitation in the proposed VWAP exception to twenty-five percent (25%). SIFMA believes that VWAP is an inherently neutral strategy that does not raise manipulation concerns. Issuers currently may

¹⁶ Specifically, the Proposal would except VWAP transactions from the price condition if the following criteria are met: (1) the VWAP purchase must be for an actively-traded security (as defined under Rule 101(c)(1) of Regulation M); (2) the VWAP purchase must be entered into or matched before the regular trading session opens, and the execution price of the VWAP matched trade must be determined based on a full trading day's volume; (3) the issuer's VWAP purchase must not exceed 10% of the average daily trading volume ("ADTV") in the security and must not be effected for the purpose of creating actual, or apparent, active trading in or otherwise affecting the price of the security; (4) the VWAP must be calculated according to a specific methodology; (5) the VWAP assigned to the purchase must be based on trades effected in accordance with the Rule's timing and price conditions, and therefore, must not include trades effected as the opening purchase reported in the consolidated system (including the opening purchase in the principal market for the security and in the market where the purchase is effected) or during the last ten (10) minutes before the scheduled close of the primary trading session in the principal market for the security, and in the market where the purchase is effected, or trades effected at a price that exceeds the highest independent bid or last independent transaction price, whichever is higher, quoted or reported in the consolidated system at the time such trade is effected; and (6) the VWAP purchase must be reported using a special VWAP (e.g., a ".W") trade modifier in order to indicate to the market that such purchases are unrelated to the current or closing price of the security. *See* Proposal at 4717.

repurchase up to twenty-five percent (25%) of the ADTV in their stock pursuant to the Safe Harbor, and permitting them to similarly repurchase this amount under the VWAP exception would make the exception more useful for issuers without raising additional manipulation concerns. Similarly, expanding the VWAP limitation would allow the market to realize the benefits of issuer repurchases noted at the outset of this letter.

Second, SIFMA member firms understand, based on the detailed manner in which VWAP is to be determined (discussed below), that the Commission intends to include within the exception full-day guaranteed VWAP transactions where the dealer acts as principal. Accordingly, we also interpret such VWAP transactions to be “market” repurchases and, as a result, we do not believe that they will be affected by the views previously expressed by the SEC staff regarding the unavailability of the Safe Harbor for “privately negotiated (off-market) repurchases.”¹⁷ Confirmation of our understandings would be helpful.¹⁸

Third, the Commission should expand the manner in which the VWAP may be calculated for an excepted repurchase. The Proposal sets forth a very precise formula for calculating the VWAP. Specifically, the VWAP must be determined by calculating the values for every regular way trade reported to the consolidated system (except those trades that do not meet the timing and price conditions of the Rule), then multiplying each such price by the total number of shares traded at that price, then compiling the aggregate sum of all values, and then dividing this aggregate sum by the total number of trade reported shares for that day in the security that represent regular way trades effected in accordance with the timing and price conditions of the Rule and which are reported to the consolidated system during the primary trading session for that security.¹⁹ SIFMA believes that issuers should have more flexibility with respect to the calculation of VWAP under the Safe Harbor.

In this regard, issuers should be permitted to choose whether to calculate VWAP based on trades occurring in the Primary Market or reflected on the consolidated tape. We note that, in the former Rule 10a-1 context, the SEC allowed broker-dealers to calculate VWAP based on primary market transactions. The Commission also should permit issuers, and broker-dealers effecting repurchases on their behalf, to agree to exclude block-sized transactions from the calculation of VWAP. Block-sized transactions occur less frequently post-Regulation NMS, and typically are privately-negotiated transactions in which other market participants are not afforded the opportunity to participate. In light of these factors and the ability of such transactions to distort the VWAP, issuers and broker-dealers should have flexibility in structuring VWAP

¹⁷ See Questions 9 & 13: Division of Market Regulation: Answers to Frequently Asked Questions Concerning Rule 10b-18 (“Safe Harbor” for Issuer Repurchases), *available at* <http://www.sec.gov/divisions/marketreg/r10b18faq0504.htm>.

¹⁸ In the Proposal, the Commission notes that the conditions contained in the VWAP exception are similar to the conditions contained in relief granted from former Rule 10a-1 for VWAP transactions. The guidance under Rule 10a-1 excepted guaranteed VWAP transactions from that rule. See e.g., Morgan Stanley & Co. Inc., SEC No-Action Letter, [2001 Transfer Binder] Fed. Sec. L. Rep. ¶72, 121 (May 11, 2001). The Commission also permits a broker or dealer to act as principal on the contra-side to fill customer orders for VWAP transactions under an exception from the alternative uptick requirement of Regulation SHO. See Exchange Act Rule 201(d)(7)(v), 17 C.F.R. § 242.201(d)(7)(v).

¹⁹ See Proposal at 4717.

repurchases to exclude block-sized transactions from the calculation of VWAP under the Safe Harbor.

Trades reported with modifiers indicating that they are unrelated to the then current market price also should be permitted to be excluded from the calculation of the VWAP under the proposed exception. In addition to average price and other transactions reported with modifiers, the Commission specifically should exclude trades excepted from the OPR, such as stopped-stock transactions, benchmark trades, error trades, non-regular way trades and contingent trades, from the calculation of VWAP.²⁰ These trades are excepted from the OPR because they are unrelated to the current market at the time of execution and, therefore, they similarly should be permitted to be excluded from the VWAP calculation under the proposed exception from the price condition of the Safe Harbor.

More generally, when determining how the VWAP should be calculated for purposes of the Safe Harbor, the SEC should consider the capabilities of service providers. Most broker-dealers and issuers executing Rule 10b-18 trades will rely on service providers to provide a VWAP that complies with the Safe Harbor; therefore, it is important that the Proposal take into account the ability of such providers to exclude various types of transactions when determining the VWAP. For example, the proposed VWAP exception includes a requirement that the VWAP exclude trades “effected at a price that exceeds the highest *independent* bid or the last *independent* transaction price, whichever is higher, quoted or reported in the consolidated system at the time such trade is effected.”²¹ If the Commission requires *all* trades used in calculating the VWAP to comply with the pricing condition described above (regardless of whether they are Rule 10b-18 repurchases), we are unsure if service providers will have the ability to identify whether *each* reported trade price is independent and otherwise complies with the pricing conditions of the Rule when seeking to provide issuers and firms with a Rule 10b-18 compliant VWAP. To avoid compliance issues with the Rule, SIFMA suggests that the SEC consider whether this aspect of the proposed pricing exception for VWAP trades is necessary for all trades used in calculating VWAP, as well as the ability of vendors to calculate VWAP under the proposed Rule more generally.

The Commission also should except any short sale made as part of a Rule 10b-18 VWAP repurchase from the new alternative uptick rule of Regulation SHO. Specifically, under that new rule, when the price for an issuer’s security decreases by ten percent (10 %) or more from its closing price the previous day, the alternative uptick rule will be triggered for that security.²² Given the anti-manipulation protections of Rule 10b-18, and the limitations associated with the proposed VWAP exception to the pricing condition of the Rule, an issuer should be able to include, as part of its VWAP Safe Harbor repurchases, those repurchases from broker-dealers selling short to effect a VWAP trade with the issuer – regardless of whether the alternative uptick

²⁰ From discussions with one service provider that provides prices for VWAP transactions, SIFMA understands that it has the ability to exclude these types of trades.

²¹ See Proposal at 4717.

²² See 2010 Amendments to Regulation SHO.

rule is then in effect.²³ The Commission previously has noted that “issuer repurchases can represent an important source of liquidity during times of market volatility” and, for that reason, it granted issuers repurchase relief during the 2008 financial crisis.²⁴

In response to the SEC’s request for comment on related VWAP issues, SIFMA does not believe it is necessary to require issuers to establish and maintain policies and procedures reasonably designed to assure that the issuer’s VWAP repurchases were effected in accordance with the conditions of the Proposal. Broker-dealers executing repurchases within the Safe Harbor already are required to maintain written supervisory procedures and trading records. As a result, there is no additional utility in having issuers maintain separate or duplicate procedures and records. Finally, SIFMA does not believe the potential for manipulation changes based on whether an order is manually or automatically executed; therefore, the proposed exception should not distinguish between VWAP trades based on how they are executed.

D. Pricing of Repurchases – Other Passive Pricing Systems

The Proposal indicates that the Commission is considering whether to expand the pricing exception to include issuer repurchases effected through certain electronic systems that match and execute trades at various times and at independently-derived prices, such as the midpoint of the National Best Bid and Offer (“NBBO”). The Commission also is considering whether to expand the Safe Harbor to permit an issuer to submit a buy order that is “pegged” to the midpoint of the NBBO at the time of execution when the issuer’s midpoint-pegged buy order is matched and executed against a sell order that also is pegged to the midpoint of the NBBO at the time of execution. The Proposal notes that the Commission granted similar relief from former Rule 10a-1 in connection with the passive pricing of short sales.²⁵

SIFMA believes that the Commission should expand the exception from the pricing condition of the Rule to include passively-priced issuer repurchases. In doing so, the Commission should clarify that the Safe Harbor would apply to Rule 10b-18 repurchases effected by any broker-dealer on a passive basis as described in the Rule, whether effected by a system that executes transactions on a periodic basis or by one that does so on a continuous basis. We also believe the Proposal should not be restricted to systems that cross issuer orders at the NBBO or midpoint of the NBBO. As long as a broker-dealer passively crosses orders priced by reference to the NBBO or midpoint, it should be able to effect matches at independently determined prices within the NBBO consistent with the Safe Harbor. Such flexibility to cross

²³ The alternative uptick rule contains an exception for certain VWAP transactions. To avoid confusion and enhance compliance with that rule and with the proposed exception of VWAP trades under Rule 10b-18, the Commission should clarify the application of the two VWAP exceptions.

²⁴ See Emergency Order Pursuant to Section 12(k)(2) of the Securities Exchange Act of 1934, Taking Temporary Action to Respond to Market Developments. Exchange Act Rel. No. 58588 (Sept. 18, 2008), 73 Fed. Reg. 55174 (Sept. 24, 2008).

²⁵ Proposal at 4718.

orders within the NBBO would allow broker-dealers greater discretion to offer price improvement to both the seller and purchaser in a Rule 10b-18 transaction.²⁶

E. General Requests for Comment

1. Block Order Exception

The Commission asks whether the Rule should retain the current “one block per week” exception to its volume limitations and whether any modifications should be made to the exception. SIFMA urges the SEC to retain the block exception for many of the same reasons stated in our 2003 comment letter.²⁷ Additionally, SIFMA believes that the SEC could modify the exception to make it more useful for issuers. Some member firms estimate that, notwithstanding issuer interest in such transactions, block repurchases have represented less than one percent (1%) on a share volume basis of total issuer repurchases executed since 2004. SIFMA members believe that the block exception is used infrequently because of the difficulty in knowing when a block will become available and the requirement that an issuer choose between executing a block trade or regular Rule 10b-18 repurchases on any given day. To cure the current problems that exist with the block exception, issuers ought to be able to effect agency repurchases under the Safe Harbor up to the time that a block transaction becomes available and then elect to effect the block transaction within the Safe Harbor.

2. Selling by Insiders

The Commission asks whether the Safe Harbor should be available for issuer repurchases during periods when an issuer’s insiders are selling their own shares of the issuer’s stock. SIFMA believes that the Safe Harbor should be available during such periods because there are sufficient safeguards in place to prevent manipulative behavior or abuse. The Rule contains a number of conditions with which the issuer must comply with respect to its own repurchases. Also, for distributions, the restrictions of Rule 102 of Regulation M provide safeguards to prevent the manipulation of securities prices by issuers and insiders.²⁸ In addition to the safeguards provided by the Rule and Regulation M, the markets are surveilled by self-regulatory

²⁶ For example, assume the national best bid is \$10.00 and the national best offer is \$10.04 and a buyer submits a NBBO midpoint peg order to an alternative trading system (“ATS”), while the seller submits an order to the same ATS to sell at the bid or better. If the ATS is limited to crossing the orders at the NBBO midpoint, the orders would be matched at \$10.02, with the seller receiving all of the price improvement. However, if the ATS is permitted to cross orders at other prices within the NBBO, the match could be effected at \$10.01, with the buyer and seller each receiving \$0.01 price improvement.

²⁷ In that letter, the Securities Industry Association (“SIA”), SIFMA’s predecessor organization, urged the Commission to retain the block exception because it substantially benefits the securities markets by allowing a sufficient level of issuer repurchase activity, which in turn provides liquidity for those securities and prevents excessive volatility in the trading of those shares. SIA also noted that the block exception is of particular importance to small issuers who would be permitted to execute only a substantially smaller volume of securities under the ADTV volume condition of the Rule. See Letter from Stuart J. Kaswell, Senior Vice President and General Counsel, SIA, to Jonathan G. Katz, Secretary, Commission (Feb. 27, 2003), available at <http://www.sec.gov/rules/proposed/s75002/sjkaswell1.htm>.

²⁸ See Exchange Act Rule 102, 17 C.F.R. § 242.102.

organizations and the Commission to detect insider trading.²⁹ The SEC also has adequate tools to address any abuses, specifically, Section 20A of the Exchange Act creates a right of action against any person that engages in insider trading and Section 10(b) and Rule 10b-5 thereunder also allow the Commission to bring actions against any persons engaged in insider trading. Finally, the use of Rule 10b5-1³⁰ plans by many insiders to sell shares of the issuer's stock provides additional safeguards against the possibilities of manipulation in connection with insider repurchases.

3. Issuer Disclosure

The Commission asks whether it should require additional disclosure of issuer buy back activity as a condition of the Safe Harbor or whether disclosure would provide a useful way to monitor the operation of (or verify compliance with) the Safe Harbor.³¹

SIFMA does not believe that additional disclosure of issuer buy back activity is needed or advisable. First, real-time disclosure of an issuer's buy back activity over the course of a day could be taken advantage of by market participants to the disadvantage of the issuer. Second, a broker-dealer that executes Safe Harbor transactions is required to maintain trading records, and these records may be accessed by the Commission and/or used by the issuer to prove compliance with the conditions of the Safe Harbor, if necessary. Third, the administrative burden of more frequent, position-limit type of disclosure (as opposed to quarterly disclosures) is not warranted – in particular for smaller issuers relying on the Safe Harbor. In sum, requiring additional disclosure of issuer buy back activity would create additional burdens for issuers relying on the Safe Harbor, while not providing any material additional benefit to the SEC or the securities markets.

4. Issuer Intent

Finally, SIFMA agrees with the position of another commenter that the VWAP exception should not focus on an issuer's intent.³² Therefore, SIFMA recommends that the Commission remove the proposed condition for the VWAP exception that the repurchase “must not be effected for the purpose of creating actual or apparent active trading in or otherwise affecting the price of the security.” As noted in the Cleary Comment Letter, the subjective element of this condition requires the issuer to prove that it did not intend to manipulate the price of the security, thereby making the Safe Harbor less useful in resolving disputes regarding an issuer's repurchase activity. More generally, this type of subjective condition runs counter to the purpose of a safe harbor – to provide certainty that anti-manipulation proscriptions will not be deemed violated if certain clear, objective criteria are satisfied. SIFMA supports the position in the Cleary

²⁹ For example, NYSE Market Surveillance uses sophisticated technology and pattern recognition systems to detect activity that may violate NYSE rules or the federal securities laws, such as insider trading. *See* NYSE Regulation, Market Surveillance, <http://www.nyse.com/regulation/memberorganizations/1022221394213.html>.

³⁰ Rule 10b5-1 provides an affirmative defense to a charge of insider trading, if the person can demonstrate that he or she complied with the conditions of the rule. *See* Exchange Act Rule 10b5-1(c), 17 C.F.R. § 240.10b5-1(c).

³¹ Proposal at 4717.

³² *See* Letter from Cleary Gottlieb Steen & Hamilton LLP, to the SEC (Mar. 3, 2010), *available at* <http://www.sec.gov/comments/s7-04-10/s70410-9.pdf> (the “Cleary Comment Letter”).

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Comment Letter and urges the Commission to remove this proposed criterion from the VWAP exception.

II. Conclusion

SIFMA appreciates the opportunity to comment on the proposed amendments to Rule 10b-18 and commends the Commission for taking steps to modernize the Safe Harbor in light of significant market developments. We generally support the proposed amendments, but encourage the Commission to modify certain aspects of the Proposal, as described above, which would make it more useful to issuers without raising additional manipulation concerns.

We look forward to discussing the proposed amendments and our comments with the Commission and its staff. If you have any comments or questions, please do not hesitate to contact me at 202.962.7300.

Sincerely,

Ann Vlcek
Managing Director and
Associate General Counsel
SIFMA

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