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Via e-mail to: rule-comments@sec.gov

U.S. Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-1090
Attention: Elizabeth M. Murphy, Secretary

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

Ladies and Gentlemen:

This letter is submitted on behalf of the Committee on Federal Regulation of Securities (the "Committee" or "we") of the Section of Business Law (the "Section") of the American Bar Association ("ABA") in response to the request by the Securities and Exchange Commission (the "Commission" or the "SEC") for comments on its January 26, 2010 proposed amendments to Rule 10b-18 under the Securities Exchange Act of 1934 (the "Exchange Act"), as set forth in the release referenced above (the "Proposing Release"). This letter was prepared by members of the Committee's Subcommittee on Trading and Markets with input from other members of the Committee.

The comments expressed in this letter represent the views of the Committee only and have not been approved by the ABA's House of Delegates or Board of Governors and therefore do not represent the official position of the ABA. In addition, this letter does not represent the official position of the Section.

I. Overview

We support the Commission's efforts to update Rule 10b-18 to better reflect how securities markets currently operate. We believe the proposed amendments, with some revisions as suggested below, would help facilitate legitimate issuer repurchases that provide liquidity to the market and benefit shareholders, while at the same time continuing to minimize the market impact of issuer repurchases and discourage market manipulation.

Stock repurchase programs continue to be very important to public companies and the securities markets generally. As the Commission acknowledges, these repurchase programs allow issuers to, among other things, (i) avoid the dilution of public shareholders otherwise caused by equity-based compensation plans, (ii) reduce outstanding capital stock following the cash sale of operating divisions or subsidiaries, and (iii) return capital to shareholders. Additionally, repurchase programs provide liquidity to the marketplace, especially in the aftermath of extreme market declines, such as the stock market crash of October 1987, following the attacks of September 11, 2001, and during the more recent market turmoil.[1] Although Rule 10b-18 is a non-exclusive mechanism for effecting repurchases that are non-manipulative, many issuers conduct their repurchases in accordance with the manner, timing, price and volume provisions of the safe harbor in order to avoid charges of market manipulation.

In 2003, the Commission amended Rule 10b-18 to update the safe harbor provisions to reflect market developments and enhance the transparency of issuer repurchases. As we stated in our comments relating to the Commission's 2002 proposals, because uncertain application of the safe harbor in evolving market conditions may result in fewer companies repurchasing securities, we believe that periodic review and modernization of Rule 10b-18 are an important Commission undertaking.[2] In addition, we believe that ongoing interpretive guidance by the staff of the Division of Trading and Markets (the "Division") is an important mechanism for maintaining the relevance of the rule and its continued application in our dynamic and fluid securities markets.[3]

We comment below on those aspects of the current proposals that, we believe, raise the most significant issues.

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[1] *See e.g.*, 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 Release No. 58588 (September 18, 2008).

[2] *See* letter dated March 23, 2003 of Stanley Keller, Chair, Committee on Federal Regulation of Securities, Section of Business Law, American Bar Association, *available at* http://www.sec.gov/rules/proposed/s75002/skeller1.htm

[3] We see the role of the Division's staff as facilitating the application of the Rule 10b-18 safe harbor provisions to evolving trading activities through proactive interpretation of the rule's provisions to circumstances that may not be clearly contemplated in the plain language of the rule. Any changes to Rule 10b-18 itself would, of course, require rulemaking.

II. Proposed Amendments to Purchasing Conditions

A. Time of Purchases

1. Opening Purchases

Currently, in order to qualify for the Rule 10b-18 safe harbor, a purchase may not be the opening regular way purchase reported in the consolidated system. The Commission proposes to modify the timing condition of Rule 10b-18 to also exclude the opening purchase in the principal market for the security and in the market where the purchase is effected. We support the Commission's efforts to eliminate ambiguity. We would, however, encourage the Commission to ensure that brokerage firms responsible for effecting repurchases made in reliance on the Rule 10b-18 safe harbor are comfortable with their ability to ensure compliance with this requirement, as any compliance issues and ambiguities in this area will have negative implications for issuers much as has been the case with "flickering quotes."

The Commission also asks whether the opening purchase timing restrictions in Rule 10b-18 should be applicable to securities which do not have an official opening of trading, such as securities quoted on the OTC Bulletin Board and the Pink Sheets. The Commission further asks whether the end of day timing limitation should be modified in any way with respect to such securities. Although price transparency for such securities is frequently more limited than for securities traded on national securities exchanges, we are not aware of any compelling need to change the current safe harbor conditions applicable to such securities. We encourage the effort of the Commission, though, to review the use of Rule 10b-18 by the issuers of such securities, and to consider whether the application to such companies of safe harbor standards that were primarily intended for companies listed on national securities exchanges requires any modification to the relevant standards.

2. End of Day Purchases

The Commission also requests comment on whether the end-of-day timing limitation of Rule 10b-18(b)(2) should be modified. Currently, purchases made in reliance on the Rule 10b-18 safe harbor can not be effected (i) during the 10 minutes before the scheduled close of the primary trading session of the principal market for the security (and, if different, also the market where the purchase is effected), in the case of a security that has an average daily trading volume ("ADTV") value of $1 million or more and a public float value of $150 million or more, or (ii) during the 30 minutes before the scheduled close of the primary trading session of the relevant principal market (and, if different, also the market where the purchase is effected), in the case of all other securities. The Commission asks whether the ADTV and public float thresholds should be raised to adjust for inflation, or should be changed to the securities offering reform standard for public float of at least $700 million (noting that those issuers had an ADTV value of $52 million).

The Proposing Release does not cite, and we are not aware of, any evidence showing that the current thresholds that are consistent with Regulation M have given rise to aberrational market activity near the end of the scheduled market close. Implementing an inflation-adjusted threshold would cause periodic changes that could be confusing to issuers seeking the protection of the safe harbor. We do not believe the Commission should modify the current thresholds. Although the Commission may determine that it is reasonable to adjust the eligibility standards used in Rule 10b-18 or other rules from time-to-time to account for inflation and changing market trends, the Committee believes that the standards used in Rule 10b-18 should remain consistent with the quantitative standards for public float value and ADTV value of the actively-traded security exceptions in Rules 101(c)(1) and Rule 102(d)(1) of Regulation M, which rules are also aimed at preventing market manipulation. As the Commission stated when it adopted the actively-traded security exceptions under Regulation M, these securities "have a sufficient market presence to make them less likely to be manipulated," and, as the Commission further noted, it is generally very expensive to manipulate these securities because of the size of transactions required to affect a price movement; these securities are generally widely followed by market participants, which means that any price aberrations are more likely to be discovered and quickly corrected; and these securities are typically exchange-traded and subject to the exchange's high levels of transparency and surveillance.[4]

We believe issuers and industry participants are both familiar and comfortable with the application of the Regulation M public float and ADTV value criteria to the safe harbor's end-of-day timing condition, and any change that would disengage the consistency of the Regulation M and Rule 10b-18 provisions would, in our view, be undesirable and unwarranted.[5]

For substantially the same reasons, we do not believe that the securities offering reform standards for well known seasoned issuers ("WKSIs") should be imported as the basis for the end-of-trading day determinations in Rule 10b-18. The public offering reform standard was intended to permit our largest public companies to avail themselves of more streamlined offering procedures and more liberal communications methods. There is, in our view, no reason to employ the standards applicable to these offering and disclosure requirements rather than the actively-traded security standards embodied in Regulation M, an anti-manipulation rule that, like Rule 10b-18, is administered by the Division.

B. Price of Purchases

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[4] 62 Fed. Reg. 520, 527 (Jan. 3, 1997) (adopting release for Regulation M).

[5] The linkage between Rule 10b-18 and the Regulation M standard is also clear from the Commission's reference to the Regulation M standard in connection with its proposals regarding the VWAP standard in the Proposing Release.

The Commission proposes to except from the price condition of Rule 10b-18(b)(3) purchases effected on a volume-weighted average price ("VWAP") basis. The Committee commends the Commission for its efforts to recognize the changes that have occurred in the market with respect to trading strategies and developments in automated trading systems and technology. Because of these changes, the Committee believes that passive pricing systems utilizing VWAP or mid-point national best bid or offer passive pricing algorithms should be exempt from the safe harbor's price condition. As we noted in 2003, the whole purpose of these algorithms is to achieve objective pricing based on benchmarks that are derived from independent market forces and are identifiable to market participants.[6] When an issuer relinquishes control over the price at which its repurchases are executed and instead allows the execution price to be determined by independent market forces, the issuer's ability to manipulate the market via price is correspondingly reduced, and the continued application of the safe harbor's other conditions should afford continued, adequate protections against the manipulative effect of any such repurchases.

The Proposing Release would limit the availability of the proposed exception for VWAP purchases (and other eligible algorithmically determined purchases) to securities that are deemed actively-traded, similar to the quantitative standards embodied in Regulation M and the safe harbor's end-of-day timing provisions as discussed above. We believe that a limitation of the exception to actively-traded securities is unnecessary because the fundamental premise of the proposed exception is that the issuer is relinquishing control over the price at which the repurchases are effected and is instead allowing the price to be independently derived from third party trading.

The Commission would further limit the proposed exception for VWAP purchases such that an issuer's VWAP purchases on any day must not exceed 10% of the ADTV in the security. Although the Commission noted that the proposed volume limitation is similar to that contained in the exemptive relief from former Rule 10a-1 granted for VWAP short sale transactions (and now codified in Rule 201 of Regulation SHO), it is important to note that the volume limitation included in the referenced exemptive letter was limited to the pre-open position of a broker-dealer who sought to act as principal to effect VWAP short sales with its clients, but did not serve to cap the volume of market transactions by the customer effecting the VWAP trades.[7] We are not aware of any empirical evidence indicating that the investor protection goals of Rule 10b-18 would be undermined if issuers whose VWAP purchases exceed 10% of the ADTV were to be entitled to rely on the VWAP exception. Absent an appropriate basis for imposing this restriction, the Committee believes the proposed volume limitation is unnecessary. We note in this regard that purchases pursuant to the proposed exception would remain subject to the daily 25% volume limitation of Rule 10b-18(b)(4).

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6 See reference to our letter in footnote 2.

7 Letter from Larry E. Bergmann, Senior Associate Director, Division of Market Regulation, Securities and Exchange Commission, to Soo J. Yim, Wilmer, Cutler & Pickering, dated December 7, 2000.

The Commission also requests comment on whether the definition of VWAP under Rule 10b-18 should be based on all regular way trades reported in the consolidated system. Although the Committee is not expressing a view herein on the basis that should be used to calculate VWAP or other independently determined prices, we respectfully urge the Commission to adopt a definition that will provide certainty in calculation and application for market participants.

C. Volume of Purchases

The Commission requests comment on whether to retain or modify the "one block per week" exception in Rule 10b-18(a)(5), which permits, among others, a single Rule 10b-18 purchase of at least 5,000 shares with a purchase price of at least $50,000, to be effected once per calendar week in lieu of purchasing under the 25% volume limitation for that day (i.e., even if such purchase would otherwise exceed the safe harbor's daily volume limit). Because we are not aware of any problems with the "one block per week" exception, we believe it should remain as is.

III. Proposed Amendments Concerning the Scope of the Safe Harbor

A. Flickering Quotes

In recognition of the increasing occurrence of flickering quotes, the Commission proposes limiting the general disqualification provision of Preliminary Note 1 to Rule 10b-18. Currently, rapid and repeated changes in the current national best bid during the period between the transmission of an order and the execution of a purchase create difficulties for companies effecting repurchases. Under the general disqualification provision of the rule, if a purchase is executed outside of the price condition of the rule, the issuer forfeits the safe harbor for all of its purchases for the day, even if those purchases met all four conditions of the rule. In recognition that flickering quotes can inadvertently cause an individual, otherwise compliant, purchase to disqualify an entire day's repurchase activity, the Commission proposes to limit the disqualification under the rule to the single trade effected outside of the price requirement.

The Committee commends the Commission for addressing this issue, and supports the revisions to the general disqualification provisions of the rule. We ask, though, whether the transaction that inadvertently failed to satisfy the price condition should be excluded from the safe harbor if the broker effecting the transaction has implemented and enforces reasonable procedures to comply with the rule and if the number of noncompliant purchases is *de minimis*. Accordingly, we respectfully ask the Commission to consider providing a conditional exemption for a limited number of inadvertent transactions.

The Commission also requests comment on whether it should specify the volume of purchases that qualify for the disqualification limitation. We do not believe that the Commission has provided any justification for limiting the volume of purchases that are eligible for the disqualification

limitation. If the Commission's concern is that the violations are inadvertent, then a limitation on the number of transactions would be consistent with such rationale, but a limitation on the volume or timing of purchases in addition to Rule 10b-18's existing volume and timing conditions would only add to the administrative complexity of complying with the safe harbor without providing a demonstrable benefit.

B. **Merger Exclusion Provision**

The Committee believes that the proposed expansion of the merger exclusion would keep Special Purpose Acquisition Company ("SPAC") issuers out of the market far longer than is necessary to prevent market manipulation. In 2003, the Committee advocated against the Commission's expansion of the merger exclusion to include periods from the time of public announcement of the merger, acquisition, or similar transaction involving a recapitalization, until the completion of such transaction. At that time, we stated that the application of the merger exclusion to purchases made during the pendency of the transaction, however long that may be, would likely result in significant disruption to issuer repurchase programs.

We understand the theoretical underpinnings of the Commission's proposal to increase the time in which the safe harbor is unavailable in connection with an acquisition by a SPAC. Although there may be circumstances where a SPAC's repurchases could be used to influence the outcome of a shareholder vote, it is not clear how that concern relates to market manipulation. Notwithstanding our comments in response to the Commission's 2002 proposed amendments to Rule 10b-18, the safe harbor's merger exclusion period now begins at a period much earlier in time than the start of the corresponding restricted period of Regulation M. To extend the duration of Rule 10b-18's merger exclusion period, as applied to SPAC issuers, even after the prophylactic restrictions of Regulation M cease to apply could prove detrimental to SPAC issuers and, ultimately, to the SPAC shareholders.[8] We note that the Rule 10b-18 safe harbor is already unavailable during certain specified time periods, including the restricted period of a distribution subject to Rule 102 of Regulation M. Moreover, if issuer repurchases are prohibited under other securities laws, they would continue to be prohibited regardless of the availability of whether specifically excluded from eligibility for the Rule 10b-18 safe harbor.

Rather than increasing the duration of the merger exclusion, we urge the Commission to conform the merger exclusion to the application of the Regulation M restricted period. In the context of Regulation M, the Commission has recognized that it is unnecessarily disruptive to impose a

[8] In the context of a merger, acquisition or exchange offer, Regulation M's restricted period only continues through to the time of the target shareholders' vote and does not apply separately during the election period for the acquiror's shareholder vote. See 17 CFR 200.100 (definition of "restricted period") and Securities and Exchange Commission, Division of Market Regulation, *SEC Answers to Frequently Asked Questions About Regulation M* (April 12, 2002 -revised).

restricted period during the entire time when a covered transaction involving a distribution is pending. It is no less true that in the context of the safe harbor of current Rule 10b-18, the exclusion of purchases from the time of public announcement of the merger, acquisition, or similar transaction involving a recapitalization, until the earlier of the completion of the transaction or the completion of the vote by the target shareholders, is an unjustified burden. We believe that any risk of manipulation during periods when no solicitation or valuation occurs would be more than adequately addressed by the substantive limits on price, time, volume and manner of purchase conditions already included in the rule.

C. Additional Request for Comments Regarding Scope of Safe Harbor

1. Specific Disclosure as a Condition of Safe Harbor

The Commission has requested comment on whether requiring specific disclosure as a condition of the Rule 10b-18 safe harbor would provide a useful way to monitor the operation of the safe harbor and, among other things, whether such disclosure should be made on a daily basis. We believe that additional disclosure would not be necessary to fulfill the Commission's goal of furnishing information to investors because existing disclosure standards applicable to issuer repurchases already assure that adequate information is provided to the investing public. Disclosure of issuer repurchases is already required in an issuer's periodic reports under Item 703 of Regulation S-K. More frequent disclosure or trade-by-trade disclosure would be extremely cumbersome for issuers and of little value to investors. The Committee does not believe that additional prescriptive requirements are necessary. Instead, issuers should have the ability to make case-by-case materiality disclosure decisions under the applicable antifraud rules, such as Exchange Act Rules 10b-5 and 12b-20, with respect to their repurchase activities.

2. Recordkeeping Requirements

The Commission has requested comment on whether the Rule 10b-18 safe harbor should require issuers to maintain separately retrievable written records concerning the trade details regarding the manner, timing, price, and volume of their repurchases made in reliance on the safe harbor. The Committee believes that the information that would be the subject of such a recordkeeping requirement would be duplicative of information already retained by the broker-dealers executing repurchases made in reliance on the Rule 10b-18 safe harbor, and in many cases, such information would only be available to issuers from their executing brokers. We further believe that a recordkeeping requirement could be burdensome and result in fewer companies determining to effect repurchases in accordance with Rule 10b-18. We strongly support the availability of an issuer repurchase safe harbor, and believe the imposition of conditions that are not tied directly to avoiding market manipulation would be detrimental to companies that may want to rely on the safe harbor, as well as to the markets generally.

3. Accelerated Share Repurchase Plans

In the Proposing Release, the Commission states that the Rule 10b-18 safe harbor is not available for issuers and broker-dealers engaging in accelerated share repurchase plans or using forward contracts to repurchase issuer stock. The Commission seeks comment on whether any manipulative concerns are raised by such methods of repurchasing securities and what limitations should be applied to address those concerns.

The Commission staff has explained that accelerated share repurchase plans and other similar transactions, such as broker-dealer's hedging transactions and forward purchase contracts, are not eligible for the Rule 10b-18 safe harbor because the issuer repurchases involve privately negotiated transactions, conducted away from the market.[9] The Committee believes that all purchases made in connection with an issuer's repurchase of its securities, whether made directly for the issuer's own account or as part of a hedging transaction undertaken by its broker, should be eligible for the Rule 10b-18 safe harbor. In either case, the availability of the Rule 10b-18 safe harbor would require compliance with Rule 10b-18's conditions regarding manner, timing, price and volume, and consistency with the Preliminary Notes to Rule 10b-18, which, among other things, exclude purchases that are an actual or apparent attempt to manipulate the market price of the issuer's security. Market manipulation is not made more likely merely because the issuer leg of the transaction is conducted separate from the open-market leg of the transaction. We see no reason to exclude an overall transaction, which involves both a privately negotiated leg and an open-market leg, from the safe harbor if the open-market leg of the transactions satisfies the conditions of Rule 10b-18.

4. Availability of Safe Harbor During Insider Sales

The Commission has requested comment on whether the Rule 10b-18 safe harbor should be available for periods in which the issuer's insiders are selling their own shares of the issuer's stock. We see no reason for precluding the use of the safe harbor during such periods. Sales by insiders are already highly regulated,[10] and reliance by insiders on resale safe harbors should not, in our view, prevent an issuer from relying on the Rule 10b-18 safe harbor. The entire purpose of a safe harbor is to identify situations in which, by reason of the conditions attached to the safe harbor, manipulation is not deemed likely to occur. The availability of one safe harbor should not, therefore, affect the availability of another safe harbor. Further, we note that many issuers have adopted insider trading policies that impose narrow trading windows whereby insiders are permitted to effect transactions in the issuer's securities. Any suspension of the Rule 10b-18 safe harbor during periods in which insiders are selling shares could significantly undermine the value of the rule, and any use by an

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[9] *See* SEC, Division of Market Regulation, *SEC Answers to Frequently Asked Questions Concerning Rule 10b-18*, Questions 9, 13, (Nov. 17, 2004).

[10] For example, Exchange Act Rule 10b5-1 and Securities Act Rule 144 provide safe harbors for the sale of securities by an issuer's insiders.

issuer of the rule would require significant coordination between the registrant and its insiders. We do not believe that precluding reliance on Rule 10b-18 during periods when insiders are selling their own shares would be appropriate. We therefore strongly urge the Commission not to amend Rule 10b-18 to preclude use of the safe harbor during periods of insider sales.

The Committee appreciates the opportunity to comment on the Proposing Release. Members of the Committee are available to discuss our comments should the Commission or the staff so desire.

Very truly yours,

/s/ Jeffrey W. Rubin
Jeffrey W. Rubin, Chair of the Committee on Federal Regulation of Securities

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