SULLIVAN & CROMWELL LLP

TELEPHONE: 1-212-558-4000
FACSIMILE: 1-212-558-3588

WWW.SULLCROM.COM

125 Broad Street
New York, NY 10004-2498

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March 15, 2010

Via E-mail: rule-comments@sec.gov

Securities and Exchange Commission
100 F Street, N.E.
Washington, DC 20549-0609

Attention: Elizabeth M. Murphy,
Secretary, Securities and Exchange Commission

Re: Comments on Proposed Revisions to Rule 10b-18
under the Securities Exchange Act of 1934, File No. S7-04-10

Ladies and Gentlemen:

We appreciate the opportunity to provide our comments on aspects of the Securities and Exchange Commission's proposed amendments[1] to Rule 10b-18 under the Securities Exchange Act of 1934 (the "Exchange Act"). We support the Commission's efforts to update the Rule in response to market changes that have occurred since the Rule was last revised in 2003, and in particular agree with several of the specific revisions contained in the proposing release, including those that would expand the scope of the opening trade exclusion, relax the price condition in the case of "flickering quotes" and permit repurchases to be made on the basis of a volume-weighted average price (VWAP). We also have several suggested changes to the proposed rules that we believe would improve the function of the safe harbor without compromising investor protection.

The proposed changes to the scope of the opening trade exclusion are appropriate

We agree with the proposed changes to the opening trade exclusion, which exclude from the Rule 10b-18 safe harbor repurchases that are the opening trade in the principal trading market for the security or in the market in which the repurchase is

1 Release No. 34-61414, 75 FR 4713, File No. S7-04-10 (Jan. 29, 2009) (the "proposing release").

executed. We appreciate the Commission's concern, as expressed in the proposing release, that such trades could disproportionately influence price discovery and thus are not appropriate candidates for the safe harbor provided by the Rule.

The "flickering quote" accommodation should allow the non-compliant transaction to fall within the safe harbor

We agree with the proposed revision to the Rule that would limit the current "daily disqualification" provision of Rule 10b-18 in the case of certain inadvertent breaches of the price condition caused by "flickering quotes" for the issuer's securities. As a result of this revision, such non-compliant repurchases would not cause other, compliant, trades carried out on the same day to be denied the benefit of the safe harbor. We believe that this is a sensible modification to the Rule, especially in light of the increasing rapidity of trading activity in today's markets.

In our view, however, this "flickering quote" accommodation should also apply to the non-compliant repurchase, so that these repurchases also have the benefit of the safe harbor. As the proposing release recognizes, flickering quotes can cause repurchase transactions to be executed in a manner that, through no fault of the issuer, fails to meet the price condition. The unintentional nature of such failure (and the fact that the issuer has no control over its occurrence) presumably underlie the view expressed in the proposing release that these non-compliant repurchases should not disqualify an entire day's trading activity from the Rule 10b-18 safe harbor. We believe that a consistent approach would also afford the protection of the safe harbor to the non-compliant transaction itself. If an issuer has carried out a repurchase transaction with a degree of propriety sufficient to avoid the daily disqualification provision of Rule 10b-18, there seems little reason, in our view, to deny the same transaction the benefit of the safe harbor.

The 10% of ADTV limitation on VWAP trades should be eliminated

We agree with the proposed revisions to Rule 10b-18 that would provide the benefit of the safe harbor to repurchases conducted on the basis of a VWAP, even if such repurchases would otherwise contravene the price condition.

We do not agree, however, with the additional limitation placed on such transactions that would restrict VWAP repurchases to 10% of the average-daily trading value (ADTV) of the security being repurchased. As noted in the proposing release, VWAP repurchases are carried out in a manner in which the issuer relinquishes control over the price at which a transaction will be executed. Accordingly, an issuer will not know whether a VWAP price will be lower or higher than a given spot price at the time it enters into the repurchase transaction. In addition, VWAP is a pricing mechanism that is well understood and largely transparent to other market participants, and one driven by

independent market forces. This is particularly so in the case of the highly liquid securities to which the proposed rules would restrict the availability of the VWAP pricing option.[2]

In light of these considerations, we do not see any reason to apply a different volume limitation to VWAP-priced repurchases than applies to transactions that are spot priced. In our view, VWAP purchases conducted in the manner discussed in the proposing release do not create any additional – and indeed may involve less – manipulation risk.

We note that the proposed 10% of ADTV limitation has its origins in a similar condition placed on no-action relief from Rule 10a-1.[3] This relief had been historically granted by the Staff to short sales made on a VWAP basis, which might otherwise have breached the Rule 10a-1 "uptick" rule. We do not see why such a condition should be imported into Rule 10b-18, however, given the significantly different contexts in which the Rule 10b-18 safe harbor and the Rule 10a-1 relief apply. In particular, we note that Rule 10b-18 already contains a volume limitation (whereas Rule 10a-1 did not), and we do not understand why the volume limitation needs to be more restrictive for VWAP-priced transactions than on share repurchases generally. Currently, the Rule 10b-18 safe harbor is restricted to repurchases that constitute no more than 25% of ADTV.[4] If the Commission views the 25% threshold as sufficient to ensure that the volume of issuer repurchase transactions does not adversely affect market price integrity when such transactions are carried out at a spot price, then there is no justification, in our view, to apply a different threshold to VWAP-priced trades.

The availability of the safe harbor should not be conditioned on criteria unrelated to the protection offered by the safe harbor

The proposing release requests comment on several suggested conditions to the availability of the safe harbor. These include compliance with Regulation S-K Item 703 disclosure requirements, the maintenance of specific trading records by the issuer, the availability of current financial disclosure and the absence of selling activity by insiders. While we believe that there are good independent reasons why each of these

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2 The proposed rules would restrict the VWAP pricing option to securities that are "actively-traded securities" for purposes of Regulation M.

3 Rule 10a-1 was removed and reserved effective July 3, 2007.

4 We note that there are certain exceptions to this limitation under extraordinary circumstances, as well as an exception for weekly block trades (which we think should also be available for VWAP purchases).

proposed criteria should not be adopted (some of which are discussed below), we also believe that all of these proposals share a common flaw, since they each concern matters not directly related to the scope or design of the Rule 10b-18 safe harbor.

Rule 10b-18 provides a safe harbor from the anti-manipulation provisions of the Exchange 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".[5] Accordingly, under Rule 10b-18 as it currently exists (and under the Rule as it would exist following adoption of the proposed rules), the conditions to the safe harbor concern only the timing, price, volume and manner of execution of a repurchase. Grafting additional, unrelated criteria onto the safe harbor is, in our view, logically inconsistent with the design of the safe harbor and could also lead to uncertainty over the scope of the protection it offers. To the extent that an issuer violates reporting or record-keeping requirements, the Rule 10b-18 safe harbor would not provide protection from liability arising from those violations, and thus there is no need to limit the safe harbor to preserve any such liability.

The suggested additional criteria also present additional problems without adding in any meaningful sense to investor protection. Requiring compliance with Item 703 disclosure, for example, would lead to retroactive disqualification of otherwise compliant repurchases from the Rule 10b-18 safe harbor. Yet a failure to meet this disclosure obligation hardly affects the determination of whether the earlier repurchase transaction was manipulative. In our view, a linkage between the availability of the safe harbor and a subsequent disclosure obligation would lead to unfair disqualifications of properly conducted repurchase transactions and create uncertainty regarding the status of such transactions at the time of the actual trade. Separate remedies exist for a failure to meet periodic disclosure obligations, and the enforcement of such remedies is the appropriate consequence of such failures.

Similarly, the absence of current financial disclosure should not disqualify an issuer's repurchases from the safe harbor. A failure to make required financial or other disclosures may give rise to remedies pursuant to the Exchange Act or rules of the Commission thereunder. Such failures do not, however, necessarily make repurchase transactions manipulative or abusive, and in particular they do not render the volume, price, manner of sale or timing of such repurchases manipulative. Existing remedies are the appropriate enforcement mechanism for any failure to meet an issuer's disclosure obligations.

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5 Rule 10b-18(b).

The proposing release requests comment as to whether the absence of insider sales should be a prerequisite for the availability of the Rule 10b-18 safe harbor. We believe strongly that the answer to this question is no. Such a condition would render the safe harbor largely unavailable to many large issuers. While issuers will generally be aware of the trading activity of their Section 16 insiders, they will frequently be unable to control such activity (for example, if sales are made pursuant to a 10b5-1 plan) or they would be required to impose unreasonably short trading windows on their insiders in order to retain the benefit of the safe harbor. In the vast majority of cases, there is little connection, in our view, between insider selling activity and issuer repurchases, and any attempt to cross-condition these two types of transactions would place an unreasonable burden on issuers without any corresponding benefit in terms of investor protection or market price integrity. In any circumstance where the two activities are linked in an abusive or fraudulent manner, existing remedies under Section 10(b), Rule 10b-5 and state laws imposing fiduciary duties should be adequate to address the wrongful behavior. Moreover, as stated in the preliminary instruction to Rule 10b-18, the safe harbor does not extend to repurchases that, although made in technical compliance with the Rule, are part of a plan or scheme to evade the federal securities laws.

Finally, we do not believe that any record-keeping or data management requirements should be imposed upon issuers as a condition to the availability of the safe harbor. Such a requirement would be redundant in light of the extensive record-keeping requirements imposed on the brokers who largely carry out repurchase transactions. Requiring the maintenance of duplicative records by issuers would add little in terms of investor protection, but would create significant logistical and financial hurdles to the use of the safe harbor.

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We wish to thank the Commission for the opportunity to submit our comments on the proposing release. Any questions in relation to our comments may be directed to David B. Harms or Robert E. Buckholz, Jr. in our New York office at (212) 558-4000.

Sincerely,

SULLIVAN & CROMWELL LLP