COMMITTEE ON SECURITIES REGULATION

ROBERT E. BUCKHOLZ, JR.
CHAIR
125 BROAD STREET
NEW YORK, NY 10004
Phone: (212) 558-3876
Fax: (212) 291-9018
buckholzr@sullcrom.com

TREVOR OGLE
SECRETARY
125 BROAD STREET
NEW YORK, NY 10004
Phone: (212) 558-7938
Fax: (212) 291-9429
oglet@sullcrom.com

March 1, 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:

This letter is submitted on behalf of the Committee on Securities Regulation of the New York City Bar in response to the Securities and Exchange Commission's proposed amendments[1] to Rule 10b-18 under the Securities Exchange Act of 1934 (the "Exchange Act").

Our Committee is composed of lawyers with diverse perspectives on securities issues, including members of law firms, counsel to corporations, investment banks, investors, and academics. Please note that Mr. Jeffrey T. Kern, a member of the Staff of the Financial Industry Regulatory Authority ("FINRA"), who is a member of our Committee, did not participate in the preparation of this letter or the decision by our Committee to submit this letter to the Commission.

The Committee commends the Commission's efforts to modernize the Rule, and in particular those changes that will remove the automatic disqualification of all same-day purchases in the event of certain

[1] Purchases of Certain Equity Securities by the Issuer and Others, Release No. 34-61414, 75 FR 4713, File No. S7-04-10 (Jan. 29, 2009) (to be codified at 17 C.F.R. 240.10b-18) (the "proposing release").

inadvertent failures to meet the price condition for a particular purchase. We have several suggested revisions to the proposed rules, however, which we believe would help better facilitate the use of the safe harbor by issuers without jeopardizing the market and investor protection objectives that the conditions prescribed by Rule 10b-18 are designed to achieve.

OVERVIEW OF THE PROPOSED AMENDMENTS

Rule 10b-18 provides issuers with a non-exclusive safe harbor from liability under the anti-fraud and anti-manipulation provisions of Sections 9(a)(2) and 10(b) of the Exchange Act, and Rule 10b-5 promulgated under the Exchange Act, in connection with repurchases of securities. The safe harbor is available if the conditions of the rule are met. These include price and volume limitations, as well as manner and timing of sale requirements.

The proposing release would make several separate amendments to Rule 10b-18, including:

- excluding from the safe harbor repurchases that are the opening transaction in the principal market for the issuer's securities (not only those that are the first trade reported in the consolidated system, as is the case under the current rule);

- including within the safe harbor certain repurchases made on the basis of a volume-weighted average price (VWAP), even if such repurchases are made at a price that would not otherwise satisfy the price limitation provided for in the rule;

- eliminating the provisions of the rule that would disqualify an entire day's trades from the safe harbor in a circumstance where the price condition is inadvertently not met solely due to the presence of "flickering quotes" for the issuer's securities (the non-compliant trade itself would continue to be disqualified); and

- extending the "merger exclusion" provision of the rule with respect to special purpose acquisition companies (SPACs) to make the safe harbor unavailable during the period of time between the announcement of a proposed merger or acquisition involving a SPAC and the subsequent vote by the SPAC's shareholders on the proposal.

The committee's comments on several of the proposed amendments follow. We also offer our thoughts on several specific topics on which the Commission has requested comment in the proposing release.

ANALYSIS OF THE PROPOSED AMENDMENTS

The committee supports the Commission's goal of modernizing the provisions of Rule 10b-18 to account for changes in trading markets and financing activities since the rule was last amended in 2003, in order to facilitate reliance on the safe harbor in a manner that is consistent with the maintenance of market integrity and investor protection. We believe that several of the proposed amendments are important steps towards this goal. At the same time, we are concerned that several of the changes contain conditions that will unnecessarily limit their usefulness to issuers.

Expansion of opening trade exclusion

The proposed expansion of the opening trade exclusion is appropriate

The Committee agrees with the proposed amendments to the rule that would exclude from the safe harbor repurchases that are the opening trades on either the principal trading market or the market in which the repurchase is effected. We agree that the price at which such trades are executed can play a significant signaling role and, therefore think the proposed amendments are appropriate.

Repurchases made on the basis of a VWAP

The Committee agrees that Rule 10b-18's price condition should be liberalized to permit repurchases made on the basis of a VWAP to have the benefit of the safe harbor. We have several suggestions, however, that we believe will improve upon the specific amendments proposed.

The nature of the transactions to which the VWAP exception applies should be clarified

We understand the proposed amendments to be addressing VWAP trades executed on an agency basis (and not to VWAP trades executed by a broker/dealer as principal), but we find the language of the proposed rule not very clear on this point. As a drafting matter, we suggest that this limitation be clarified and made explicit.

In addition, in response to a specific question asked in the proposing release, the Committee does not believe that any distinction should be made between VWAP trades executed through automated systems or those made manually. Our understanding is that manual intervention is commonly needed to assure smooth VWAP trade execution, and since the VWAP is determined objectively, manual intervention does not create any additional manipulation risk.

The 10% of ADTV limitation on VWAP trades will significantly reduce the utility of the VWAP exception to issuers

As noted above, the proposing release addresses agency trades conducted on a VWAP basis, such as those in which clients' buy and sell orders are matched by a broker-dealer prior to or soon after market open. We agree that it is appropriate to extend the benefit of the safe harbor to issuer repurchases conducted in this manner, but believe that it is unnecessary to impose a different size limitation for such trades. The proposed rules would limit purchases made on a VWAP basis to no more than 10% of the ADTV in order to qualify for the exception from the price condition. The 10% threshold is consistent with the limitation contained in several no-action letters relating to short sales made on a VWAP basis that might otherwise have contravened the "uptick" rule under former Rule 10a-1. In light of the different context in which Rule 10b-18 applies, however, we do not see why a limitation developed to address short sales should be imported into Rule 10b-18.

The Committee does not believe that the more restrictive 10% limitation would serve any significant purpose in terms of protecting against price manipulation by issuers. As proposed, the VWAP exception to the price condition would only apply to securities that qualify as actively traded securities for purposes of Regulation M. This requirement limits significantly the opportunity for market manipulation that might otherwise exist for a thinly traded security. In addition, as the proposing release notes, VWAP trades are made in a manner such that the issuer relinquishes control over the pricing of their trade executions, which further reduces the ability of repurchasing issuers to engage in abusive market activities. VWAP trades are priced on a basis that is well recognized by market participants, driven by independent market forces and largely transparent. As a result, the Committee does not believe that VWAP trades present any significant additional risk to market integrity, and accordingly sees no

justification for the imposition of a more restrictive volume condition than would apply to repurchases made on a non-VWAP basis.

The exemption should apply to VWAP trades matched within the first 30 minutes of trading in the principal trading market for the issuer's securities

The proposing release requests comment as to whether repurchases made on a VWAP basis but matched after the market open should nonetheless qualify for the safe harbor. The Committee believes that VWAP repurchases matched within the first 30 minutes of trading should so qualify. Our understanding is that issuers will commonly wish to ascertain market conditions before determining whether they enter into VWAP repurchases on a given trading day. Allowing for a thirty-minute observation period would permit this market discovery process to occur without providing issuers with any significant additional ability to engage in manipulative trades. Issuers engaging in VWAP-based repurchases matched within 30 minutes of market open still surrender control over trade execution and the VWAP will still be based on the substantial majority of trading volume occurring during the day.

No additional data management requirements should be imposed as a condition to the VWAP exception

The proposing release requests comment as to whether any particular record-keeping or data management protocol should be required as a condition to the availability of the VWAP exception from the price condition. As discussed further below, the Committee believes that the imposition of specific data retention obligations would be unduly burdensome to issuers, who cannot be expected to maintain the technical infrastructure necessary to collect and retain the requisite information. More fundamentally, we believe that the broker-dealers executing Rule 10b-18 repurchases should already be maintaining complete records reflecting all relevant data. We do not see what purpose would be served by imposing an additional, and overlapping, obligation on the issuer.

Relief from the price condition in circumstances of "flickering quotes"

"Flickering quote" provisions should be extended to avoid disqualifying inadvertent trades made outside of the price condition

The Committee agrees with the proposed revision that would eliminate the current provisions in Rule 10b-18 that disqualify an entire day's trades from the safe harbor in the event of an inadvertent breach of the price condition caused solely by the presence of "flickering quotes". We agree with the assessment in the proposing release that the increased speed of trading evident in today's market makes compliance with the price condition difficult in many cases. Accordingly, we believe that the proposed revision is an appropriate modernization to the rule.

We believe that the "flickering quote" provision should be extended, however, so that the non-compliant trade itself is kept within the safe harbor. The rationale for eliminating the daily disqualification provision, as expressed in the proposing release, is that issuers should not be penalized for non-compliant trade executions that are outside the issuer's control when bid and trade prices are moving rapidly. In the Committee's view, a consistent application of this rationale would also bring the non-compliant trade itself within the safe harbor. Since the breach of the price condition was beyond the issuer's control, disqualifying the trade from the safe harbor serves little or no purpose in terms of regulating market behavior.

While we do not believe any limitation is needed, should the Commission determine that some restriction on flickering quote relief is necessary, the revised rule could readily incorporate a threshold above which

the relief would not be available. In the Committee's view, such a threshold could be designed so that relief would be available so long as non-compliant trades represented less than a given (1) percentage of daily repurchases, (2) number of daily repurchases or (3) dollar value of daily repurchases.

No additional data management requirements should be imposed as a condition to "flickering quote" relief

The proposing release requests comment as to whether any particular record-keeping or data management protocol should be required as a condition to the availability of "flickering quote" relief. As discussed above with respect to the similar question posed in relation to the VWAP exception, and further below more generally, the Committee does not believe such requirements are warranted.

RESPONSES TO ADDITIONAL REQUESTS FOR COMMENTS IN THE PROPOSING RELEASE

Comments with respect to issuer repurchases conducted on markets outside the United States

In the proposing release, the Commission requested comment on several questions regarding issuer repurchases made on foreign exchanges. In general, the Committee does not believe that applying the conditions of Rule 10b-18 to foreign markets will serve any useful purpose. Our understanding is that most foreign exchanges maintain their own requirements with respect to issuer repurchases and that these requirements may be inconsistent with or conflict with the conditions of Rule 10b-18. Accordingly, simultaneous compliance with both sets of rules might be difficult or impossible.

The Committee does believe, however, that the Commission should consider extending the benefits of the Rule 10b-18 safe harbor to repurchases made over the facilities of certain foreign securities exchanges, when such repurchases are made in accordance with the rules prevailing on those exchanges. In such a circumstance, an issuer would comply with the foreign conditions in lieu of those prescribed by Rule 10b-18. The Commission could specify the particular foreign exchanges in respect of which the safe harbor would apply, thereby minimizing any concern about abusive trades taking place on foreign exchanges that lack sufficient oversight of issuer repurchases. The Commission might also consider the use of the existing definition of "designated offshore securities market" in Rule 902 of Regulation S as a proxy for exchanges having acceptable regulatory regimes. In the Committee's view, the criteria applied by the Commission in determining which foreign exchanges qualify for the purposes of offshore transactions made in reliance on Rules 903 and 904 of Regulation S are similar to those that would be appropriate for purposes of Rule 10b-18. The commission could, if it felt necessary, supplement this test with a further condition that the foreign market have issuer market manipulation rules comparable to U.S. manipulation provisions. (We note that Rule 104(g) of Regulation M might be seen as taking an analogous approach). However, we suggest that any such condition not be defined in terms of the foreign market's having a provision similar to Rule 10b-18, because we believe that the condition should turn on the affirmative regulation of issuer manipulation, not on the availability of a safe harbor rule (which we believe may be relatively uncommon in other markets).

Any extension of the benefits of Rule 10b-18 to trades conducted on foreign exchanges should not be limited, in the Committee's view, to foreign private issuers. U.S. domestic issuers should not be disadvantaged relative to their foreign counterparts. Allowing both U.S. and foreign issuers to execute foreign repurchases on an equal basis is consistent both with the protection of market integrity and a recognition of the increasing importance of foreign trading markets to domestic issuers.

The safe harbor should be available regardless of whether insiders are selling stock

In response to the specific request for comment in the proposing release, the Committee does not believe that the availability of the Rule 10b-18 safe harbor should be suspended during periods where insiders are selling shares of the issuer's stock. In the Committee's view, there is no valid policy reason to condition issuer repurchases on the absence of insider sales. Insiders sell stock for many different reasons, including diversification, estate planning and liquidity needs, many of which are entirely unrelated to and independent of an issuer's motivation to conduct repurchases. Any requirement that insider sales cease before repurchases can take place within the safe harbor would either (i) severely curtail the availability of Rule 10b-18 to many issuers, to the potential detriment of their shareholders, without any corresponding benefit in terms of market integrity, or (ii) unnecessarily discourage legitimate dispositions by insiders, particularly at companies with ongoing long-term share repurchase programs. In addition, the timing of trades on behalf of insiders pursuant to 10b5-1 plans will typically be outside the control of the issuer, rendering the availability of the safe harbor unpredictable. Any linkage between insider sales and Rule 10b-18 repurchases could create unnecessary competition between issuers and insiders for transactions occurring within the typically narrow trading windows permitted to insiders under the insider trading policies of many issuers. We note that where the selling activity rises to the level of a "distribution" as defined in Regulation M, the restrictions of Rules 101 and 102 would of course become applicable.

The Committee acknowledges that there may be situations where insiders, particularly of smaller issuers, are able to exercise unfettered control over repurchase transactions conducted by such issuers, and there may be heightened manipulations concerns in those situations. We believe, however, that any such concerns arise infrequently and are largely addressed by the existing conditions on the Rule 10b-18 safe harbor. In addition, and more fundamentally, existing anti-fraud provisions under the Exchange Act are sufficient to deal with actual manipulative schemes. This is especially the case when those provisions are considered together with the general anti-avoidance principle in instruction 1 to Rule 10b-18.

The safe harbor should not be conditioned on compliance with Item 703 of Regulation S-K, or on real-time disclosure of issuer repurchases

The proposing release requests comment as to whether the availability of the safe harbor should be conditioned on the issuer complying with the disclosure requirements of Item 703 of Regulation S-K. The Committee's view is that it should not. The safe harbor provided by Rule 10b-18 is designed to ensure that issuers do not manipulate the price of their securities through their activities in the marketplace. Accordingly, its conditions relate to the conduct of the transactions themselves, and any transaction conducted in compliance with those conditions can be assumed not to have resulted in a market price that has been manipulated. Since the safe harbor conditions accomplish their desired goal at the time of the market transaction, it would not make sense in the Committee's view to retroactively disqualify otherwise compliant transactions for reasons of subsequent non-disclosure. The disclosure mandated by Item 703 (as required in Forms 10-Q and 10-K) is a separate obligation of an issuer under Section 13(a) of the Exchange Act, and any failure to meet that obligation should carry the same consequences as other disclosure deficiencies. A lack of Item 703 disclosure does not cause a previously non-manipulative market transaction to subsequently become manipulative. Requiring compliance with Item 703 as a condition to the safe harbor would, in the Committee's view, divorce the conditions of Item 10b-18 from its policy objectives.

Similarly, the absence of current financial information should not disqualify issuers from having the benefits of the safe harbor. The absence of such information does not increase the likelihood that the

manner of sale, price, volume or timing of a repurchase would cause it to be manipulative. Issuers are still be subject to Section 10(b) of the Exchange Act and Rule 10b-5 if the lack of financial disclosure means that the issuer is in possession of material non-public information at the time the repurchase is executed.

In addition, the Committee does not believe that any real-time disclosure of issuer repurchases should be required. In our view, there is no evidence that such disclosure would contribute meaningfully to market integrity or that the absence of such reporting has created any deficiency. The Committee is also concerned that such disclosures could create the opportunity for other market participants to engage in manipulative trading by "gaming" an issuer's repurchase activities.

No special record-keeping obligations should be imposed on issuers in connection with Rule 10b-18 repurchases

The proposing release also requests comment as to whether issuers should be required to maintain specific records regarding its Rule 10b-18 repurchases. The Committee's view is that no such obligations should be imposed. Detailed records regarding an issuer's trading activity are maintained by the issuer's broker as part of the general record-keeping obligations imposed on registered market participants by the SEC and by self-regulatory agencies, and are also available through market reporting services such as Bloomberg. These market participants have the systems and facilities to maintain the requisite information. Requiring a separate set of these records to be maintained by issuers (who will often lack the appropriate infrastructure to do so) is redundant and will impose a significant financial and administrative burden on issuers without any corresponding benefit to the market.

* * * * *

Members of the Committee would be pleased to answer any questions you may have concerning our comments.

Respectfully Submitted,

/s/Robert E. Buckholz, Jr.

Committee on Securities Regulation

Drafting Subcommittee

Julie M. Allen
Bernd Bohr
Robert E. Buckholz, Jr.
Martin M. Cohen
Matthew D. Leavitt
Trevor Ogle
Christoph A. Pereira
Gerald J. Russello
Maureen Sladek
Robert C. Vincent, III

Securities Regulation Committee

Julie M. Allen
Bernd Bohr
Martin M. Cohen
Caroline Gentile
Marc D. Jaffe
Kevin W. Kelley
Michael T. Kohler
Matthew D. Leavitt
Adam R. Meshel
Luis R. Penalver
Andrew J. Pitts
Maureen Sladek
Thomas W. Yang
Margaret A. Bancroft
Robert E. Buckholz, Jr.
Stephen P. Farrell
Arunas E. Gudaitis
Stacy J. Kanter
Jeffrey T. Kern
Richard M. Kosnik
Kenneth L. MacRitchie
Lona Nallengara
Christoph A. Pereira
Richard Smith
Bruce C. Bennett
Patricia A. Cappeto
Lisa F. Firenze
Jefferey M. Haber
Jeffrey D. Karpf
Deanna Kirkpatrick
Richard F. Langan, Jr.
Martha Mensoian
Risë B. Norman
Vincent J. Pisano
Gerald J. Russello
Robert C. Vincent, III