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March 3, 2010

Via Email
Securities and Exchange Commission
101 F Street, N.E.
Washington, D.C. 20549-1090

Re: S7-04-10 – Proposed Rule: Purchases of Certain Equity Securities by the Issuer and Others (the "Proposing Release")

Ladies and Gentlemen:

We are submitting this response to the request of the Securities and Exchange Commission (the "Commission") for comments on the Commission's proposal (the "Proposal") to amend Rule 10b-18 ("Rule 10b-18") under the Securities Exchange Act of 1934 (the "Exchange Act"). We appreciate the opportunity to comment on the Proposal.

The Proposal would, if adopted, make certain changes to the "safe harbor" from liability for manipulation available to issuers repurchasing their common stock in the market. As noted by the Commission in the Proposing Release, issuer stock repurchases can serve important and legitimate business purposes. The safe harbor provided by Rule 10b-18 allows issuers to engage confidently in these repurchase transactions without fear of incurring liability for manipulation. We commend the Commission's effort to revise the safe harbor to accommodate market developments in issuer repurchase practices. However, we believe important revisions to the Proposal are required in order to maximize the safe harbor's effectiveness and availability to issuers. These revisions can be adopted while maintaining clear and strict limits on the safe harbor to exclude practices that may be employed to manipulate the price of securities.

1. ***The criteria proposed for the exception to the price condition for repurchase transactions executed on a VWAP basis should be revised***

We commend the Commission's proposal to provide an exception to Rule 10b-18's price condition for issuer repurchases through VWAP transactions (the "VWAP exception"). The reasoning underlying the exception is sound – VWAP transactions are priced based on objective market data, reducing the risk of issuer manipulation. Because VWAP repurchases do not lend themselves to market manipulation, we believe some of the eligibility criteria proposed by the Commission for the VWAP exception unnecessarily restrict the ability of issuers to use VWAP transactions to repurchase shares under the safe harbor.

A. ***Issuer repurchases conducted on a VWAP basis should be subject to the same 25 percent volume limitation that applies to other issuer repurchases covered by the safe harbor***

Under the current Rule 10b-18, the volume condition for safe harbor eligibility limits issuers to daily repurchases of up to 25 percent of their average daily trading volume ("ADTV"). Alternatively, issuers can repurchase shares in block trades once per week. Shares repurchased through weekly block trades are permitted to exceed 25 percent of an issuer's ADTV. The Commission proposes a ten percent ADTV daily volume limitation on shares repurchased through transactions on a VWAP basis. We believe this ten percent restriction unnecessarily restricts issuer use of VWAP transactions to repurchase shares.

According to the Proposing Release, the purpose of the Rule 10b-18 volume limitation is to "prevent an issuer from dominating the market for its securities through substantial purchasing activity." In originally adopting Rule 10b-18, the Commission determined a volume limitation of 25 percent was appropriate to minimize the possibility of manipulation. It is unclear why, in VWAP transactions, where issuers do not make pricing decisions, repurchase volumes of above ten percent of ADTV raise concerns of market domination. The removal of the issuer from pricing decisions for VWAP purchases should only increase the Commission's comfort that the 25 percent threshold is sufficiently low to prevent price manipulation.

B. ***The issuer's intent should not be a condition to eligibility for the VWAP exception***

The Proposed Rule includes among the criteria for the proposed VWAP exception that the issuer's VWAP purchase "not be effected for the purpose of creating actual, or apparent, active trading in or otherwise affecting the price of any security." The inclusion of a subjective purpose or scienter element in the criteria for eligibility for the safe harbor significantly reduces the value of the safe harbor to issuers by increasing the likelihood that courts will deny motions for summary judgment based on the safe harbor.

For this reason, we urge the Commission to remove the purpose criterion from the VWAP exception.

Like any safe harbor from liability, much of Rule 10b-18's value derives from its availability to defendants on motions for summary judgment in a civil action. In order to be successful in a motion for summary judgment, defendants must demonstrate to a court that based on the evidence gathered there exists no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. To be effectively available for summary judgment, a safe harbor provision should rely on conditions that lend themselves to a clear demonstration of whether a genuine issue of material fact exists. For instance, the 10b-18 safe harbor's transaction-focused conditions – pricing, volume, single broker-dealer and timing conditions – are likely to be clear-cut factual matters about which reasonable persons could not disagree. Courts should be comfortable granting summary judgment based on facts that demonstrate compliance with these clear conditions. Scienter, on the other hand, although subject to heightened pleading standards, may be found to raise a question of fact. For this reason, courts are more likely to defer matters of scienter to determination by the trier of fact. In the case of a motion for summary judgment, such deference could require the court to deny the motion and allow the claim to proceed to trial. In effect, the inclusion of the purpose criterion threatens to greatly reduce the value of the VWAP exception to issuers.

As previously noted, the criteria proposed for the VWAP exception, including the revisions suggested in this letter, sufficiently guard against the possibility of issuers utilizing VWAP repurchases to manipulate share prices. It is not clear how a scienter element, which has no direct bearing on events in the market, would advance that objective. Admittedly, there always exists the possibility that issuers with ill intent will find novel ways of using transactions that meet the requirements of the safe harbor, including VWAP transactions, to manipulate stock prices. However, this concern should be sufficiently assuaged by the unavailability of the safe harbor for any "repurchases that, although made in technical compliance with the section, are part of a plan or scheme to evade the federal securities law."

The purpose criterion of the VWAP exception reduces the value of the safe harbor to issuers while providing no significant incremental protection for the integrity of the market. We believe it should be eliminated from the revised Rule 10b-18.

C. *The definition of "VWAP Rule 10b-18 purchase" should be expanded to permit issuers to calculate the VWAP based only on trades occurring in the primary market*

The definition of "VWAP Rule 10b-18 purchase" proposed by the Commission bases the calculation of VWAP on all regular way trades reported in the consolidated system. We believe this proposed definition is unnecessarily restrictive, and the term should be defined to permit, as an alternative, calculations based only on trades reported in the primary market for the security.

Expanding the proposed definition of VWAP Rule 10b-18 purchase to permit issuers to calculate the VWAP based only on trades occurring in the primary market would not diminish the key safeguards of VWAP-based transactions: issuers would have no control over price determination, and execution prices would be based on objective market data. In addition, we understand reliance on trades reported in the consolidated system is not a uniform industry practice in calculating VWAP. In our experience, many brokerage firms prefer to calculate VWAP based on trades reported in the primary market. Expanding the proposed definition to allow for this method of calculation would still assure that repurchases conducted through VWAP transactions incorporate reliable safeguards against price manipulation.

2. *The Rule 10b-18 safe harbor should be available for issuer repurchases conducted in non-U.S. markets*

The Commission should expand the scope of the safe harbor to cover repurchases on non-U.S. markets. Many issuers, both U.S. and foreign, have shares listed both in the United States and abroad and conduct share repurchases in the non-U.S. market as well as the U.S. market. Repurchases by these issuers in non-U.S. markets may implicate the anti-manipulation provisions of the U.S. securities laws, but the Rule 10b-18 safe harbor is not available.[1]

We urge the Commission to provide these issuers with greater certainty by amending Rule 10b-18 to provide a safe harbor for repurchases on non-U.S. markets. Such a safe harbor would be especially valuable for foreign private issuers, but we would support extending it also to U.S. issuers at least where the primary trading market is outside the United States.

We believe the most effective approach would be to amend Rule 10b-18 to provide a safe harbor for issuer repurchases conducted in a foreign market in compliance with the conditions of the Rule as applied to that market. Under this approach, repurchases on a given foreign market would be within the safe harbor if (1) the issuer uses a single broker or dealer in that market on any single day, (2) the timing condition is met with respect to the opening and closing times in that market, (3) the issuer purchases at a price no higher than the highest independent bid or last independent transaction price in that market and (4) the volume of purchases on any single day does not exceed 25 percent of ADTV on that market. This approach has been more fully described in comment letters on the Commission's previous amendments of Rule 10b-18.[2]

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[1] *See* Question number 5, 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).

[2] *See* Letter from American Bar Association, to the SEC (March 24, 2003) (available at http://www.sec.gov/rules/proposed/s75002/skeller1.htm) and Letter from Cleary, Gottlieb, Steen & Hamilton, to the SEC (Feb. 18, 2003) (available at http://www.sec.gov/rules/proposed/s75002/cleary1.htm).

Alternatively, the Commission could amend Rule 10b-18 to provide a safe harbor for issuer repurchases conducted in a foreign market in compliance with applicable local law and exchange regulations. This approach might be limited to specified markets or to "designated offshore securities markets" as defined in Rule 902 under the Securities Act.

Just as in the U.S. markets, a safe harbor for issuer repurchases that do not present significant potential for abuse would provide a useful clarification for issuers and foreign regulators without any cost in terms of investor protection.

3. *The disclosure of issuer repurchases required by Item 703 of Regulation S-K is sufficient, and no additional disclosure or record retention obligations are warranted*

Currently, listed companies in the United States must disclose their share repurchases in compliance with Item 703 of Regulation S-K in their Form 10-Q and 10-K filings (and in the case of foreign private issuers, in their Form 20-F filings). We believe additional disclosure regarding issuer repurchases would not advance the stated policy objectives of Rule 10b-18 and should not be required.

In the Proposal, the Commission states that Rule 10b-18's conditions "are designed to minimize the market impact of the issuer's repurchases." Each of the safe harbor conditions focuses on a particular aspect of the repurchase transaction – price, volume, timing or manner – that advances this objective of minimizing market impact. Disclosure does not further this purpose.

An alternative justification for a disclosure requirement suggested in the Proposal is to facilitate the market's ability to "verify compliance with the safe harbor." This same reasoning may also motivate the Commission's request for comments on whether issuers should be required to retain records related to share repurchase transactions. However, this reasoning distorts the purpose of a safe harbor. Rule 10b-18 serves as an affirmative defense available to issuers in actions alleging liability for manipulation. The Rule is not an affirmative requirement with which issuers must comply generally. Indeed, the Commission has on several occasions considered whether to adopt mandatory rules to regulate issuer repurchases through proposed Rule 13e-2. Each time this approach has been considered, the Commission has refused to adopt it. Instead, the Commission has opted for the voluntary regime of the Rule 10b-18 safe harbor. Rule 10b-18(d) clearly states that failure to meet the conditions of the safe harbor do not give rise to any presumption of issuer manipulation. In this context, requiring disclosure as a means to "verify compliance" makes little sense.

More disclosure or record retention would also be costly to issuers, difficult to reconcile with existing procedures for share repurchases and possibly at odds with an issuer's ability to execute repurchase programs in reliance on Rule 10b5-1. In our experience, many issuers engaged in issuer repurchase plans execute these repurchases through 10b5-1 plans that allow issuers to remove themselves from pricing and timing decisions and delegate those decisions to broker-dealers. As a result, under current

arrangements, many issuers do not have access to the information that additional disclosure might require. Collecting such information would be costly, burdensome, time consuming and redundant with the existing duties of broker-dealers to collect and retain such information. In addition, real-time or even prompt disclosure of an issuer's repurchases signals to the market that an issuer has begun repurchasing its shares. With this information, shareholders otherwise willing to sell at prevailing prices may decide to hold out for a higher price. In this way, disclosure of the share repurchase program may produce the very result anti-manipulation provisions seek to guard against in the first place – artificially elevated share prices due solely to issuer repurchase activity.

4. *Rule 10b-18 should be available for issuer repurchases during periods when issuer insiders are selling their own stock*

Section 10(b) and Rule 10b5-1 prohibit, among other things, issuers and corporate insiders from purchasing or selling company stock on the basis of material non-public information. As a result of this restriction and the cycle of corporate financial disclosure, both issuers and insiders are effectively restricted to periodic window periods during which they can trade in company stock. If the Commission were to require as a condition to the safe harbor that issuers not repurchase shares when insiders are selling shares, it would further restrict legitimate trading activity and require burdensome coordination efforts between the company and its insiders. Regulation M is protection enough if insider sales amount to a Regulation M distribution; if not, the de facto prohibition on issuer repurchases that would result from the absence of the safe harbor is uncalled for. This is particularly true for repurchases in compliance with the Rule 10b-18 safe harbor, because the premise of the safe harbor is that repurchases conducted in accordance with the Rule do not affect share prices.

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We thank you for the opportunity to comment on the Proposing Release. We would be happy to discuss with you our comments or any other matters you feel would be helpful in your review of the proposals. Please do not hesitate to contact Leslie N. Silverman or Michael D. Dayan if you would like to discuss these matters further.

Very truly yours,

CLEARY GOTTLIEB STEEN & HAMILTON LLP