



JAECKLE FLEISCHMANN & MUGEL, LLP
ATTORNEYS AT LAW

November 24, 2003

**SEC Adopts Changes to Issuer Repurchase Safe Harbor Rule 10b-18;
Requires Disclosure of Issuer Repurchases of Its Equity Securities**

The SEC recently amended its Rule 10b-18 under the Securities Exchange Act of 1934 which provides a "safe harbor" for an issuer's and its affiliates' repurchases of the issuer's equity securities. The SEC also adopted new requirements that issuers disclose all issuer repurchases (both open market and private transactions), regardless of whether the repurchases are effected in accordance with the safe harbor rule. The SEC indicated that the amendments are intended to simplify and update the safe harbor provisions and to enhance the transparency of issuer repurchases.

Overview of Rule 10b-18

Rule 10b-18 provides a limited safe harbor from federal securities law liability for companies and affiliated purchasers who bid for or repurchase the company's common stock in the market. As a safe harbor, Rule 10b-18 is not the exclusive means by which issuers and their affiliates may effect purchases of the issuer's common stock without manipulating the market. The SEC reiterated that the failure to satisfy the conditions of the safe harbor does not give rise to any presumption that a repurchase is manipulative. To come within the safe harbor, a company must satisfy the Rule's *manner, timing, price* and *volume* conditions when purchasing its own common stock in the market.

Manner of purchase condition. To qualify for the safe harbor, an issuer and its affiliated purchasers may use only a single broker or dealer on any single day for all Rule 10b-18 purchases, other than unsolicited transactions. This condition, which was not altered by the recent amendments, is designed to avoid the appearance of widespread trading in a security that could result if many brokers or dealers were used to purchase stock.

Timing condition. Under former Rule 10b-18, a company relying on the safe harbor was not permitted to (i) make the opening reported bid or purchase, or (ii) bid or repurchase during the last 30 minutes before the scheduled close of reported trading. The revised rule maintains the exclusion for purchases at the opening. For purchases near the close of trading, Rule 10b-18 was revised to reflect the relative liquidity of the security and the likelihood of an issuer's purchases affecting the closing price. Under the amended rule, issuers with securities having an average daily reported trading volume during the preceding four weeks

(ADTV) of at least \$1 million and a public float of at least \$150 million may not bid for or purchase their securities during the last 10 minutes before the scheduled close of the primary trading session in the principal market for the security, or during the last 10 minutes before the scheduled close of the primary trading session in the market where the purchase is made. A 30 minute exclusion period continues to apply to issuers of all other securities.

Price condition. Under the former rule, the price limitations varied depending upon the type of market on which the security was traded. As amended, Rule 10b-18 applies a uniform price condition, in which the purchase price may not exceed the higher of the highest independent bid or the last independent transaction price quoted or reported in the consolidated system,¹ regardless of the market on which the securities are traded.

Volume condition. Rule 10b-18 limits the number of securities an issuer relying on the safe harbor may purchase. An issuer may effect daily purchases in an amount up to 25% of the ADTV. However, under the former rule, both the 25% limit and the ADTV excluded block purchases.² As such, an issuer could make unlimited block purchases without losing the safe harbor protection afforded by Rule 10b-18. Under revised Rule 10b-18, issuers must now include block purchases in applying the 25% volume limitation. However, issuers will now also include their block purchases in calculating the ADTV, thereby increasing the number of shares they will be able to purchase within the safe harbor. The safe harbor, as amended, will allow one block repurchase per week of any size (even if in excess of the 25% of ADTV limit) in lieu of making any other Rule 10b-18 purchases on that day. However, blocks purchased in reliance on this provision may not be included in the four-week ADTV.

Expanded Disclosure of Repurchases

In addition to the revisions to Rule 10b-18, the SEC adopted rules requiring issuers to disclose information concerning repurchases of their equity securities in a new table in Forms 10-Q/10-QSB (new Item 2(e)) and 10-K/10-KSB (new Item 5(c)). All purchases will be required to be disclosed, whether on the open market or in private transactions, and whether or not made in reliance upon Rule 10b-18.

The table requires disclosure of the total number of shares purchased, reported on a monthly basis, the average price paid per share, the total number of shares purchased as part of publicly announced repurchase plans or programs, and the maximum number or approximate dollar value of shares that may yet be purchased under the plans or programs.

¹ For securities not so quoted or reported, the maximum price will be the greater of (1) highest independent bid or (2) the last independent transaction price, that is displayed and disseminated on a national securities exchange or inter-dealer quotation system that displays at least two independent price quotations for the security. For all other securities, the maximum price will be the highest independent bid obtained from three independent dealers.

² The term "block" means a quantity of stock that either: (i) has a purchase price of \$200,000 or more; (ii) is at least 5,000 shares and has a purchase price of at least \$50,000; or (iii) is at least 20 round lots of the security and totals 150 percent or more of the trading volume for that security.

In footnotes to the table, the issuer must disclose the date of announcement of each publicly announced repurchase plan or program, the share or dollar amount approved by the board, the expiration date (if any) of each plan or program, each plan or program that has expired during the period covered by the table, and each plan or program the issuer has determined to terminate prior to expiration or under which the issuer does not intend to make further purchases.

In addition, footnote disclosure is required regarding the number of shares purchased other than through publicly announced repurchase plans or programs, including the nature of the transactions (e.g., open-market transactions, tender offers or exercise of put options).

Effective and Compliance Dates

The new rules become effective December 17, 2003. The new disclosure obligations for issuer repurchases will apply to an issuer's quarterly and annual reports filed for periods ending on or after March 15, 2004.

This memorandum briefly addresses only certain aspects of the changes to Rule 10b-18. Issuers expecting to repurchase common stock after the amendments become effective should review the SEC's final rule carefully before doing so.

* * * * *

The information in this Alert is intended for general information purposes only and should not be considered legal advice or opinion on any specific facts or circumstances. You are urged to contact a professional advisor concerning any specific question you may have relating to your own situation.

If you would like to discuss the matters presented in this Alert you may contact:

Michael C. Donlon, Esq.....	716-843-3881; mdonlon@jaeckle.com
Kayla E. Klos, Esq.....	716-843-3858; kklos@jaeckle.com
Joseph P. Kubarek, Esq.....	716-843-3862; jkubarek@jaeckle.com
Jeffrey H. LaBarge, Esq.....	585-262-0909; jlabarge@jaeckle.com
Edwin M. Larkin, Esq.....	585-262-0916; elarkin@jaeckle.com
Robert N. Latella, Esq.....	585-262-0990; rlatella@jaeckle.com
William I. Schapiro, Esq.....	716-843-3896; wschapiro@jaeckle.com
James J. Tanous, Esq.	716-843-3905; jtanous@jaeckle.com