

## CORPORATE AND SECURITIES LAW ALERT

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

### SEC Proposes Changes to Rule 10b-18: Issuer Repurchases

February 8, 2010

Rule 10b-18 under the Securities Exchange Act of 1934 provides an issuer a non-exclusive “safe harbor” from liability for market manipulation for issuer stock repurchases, provided the issuer complies with the Rule’s manner, timing, price and volume conditions. On January 26, 2010, the SEC proposed amendments to Rule 10b-18 designed to “clarify and modernize” the Rule to address changes in trading practices and technologies since the Rule’s adoption.

The proposed revisions to Rule 10b-18 would significantly alter how issuers utilize the safe harbor by making the following changes:

- **Expand the timing condition to further restrict opening purchases.** Under the current rule, an issuer’s repurchase may not be the opening regular way purchase reported in the consolidated system. The proposal would expand the timing condition to preclude issuer repurchases as the opening purchase in the principal market for the security and in the market where the issuer repurchase is effected. This change is intended to decrease the likelihood that an issuer may meet the current condition of the safe harbor but still impact the market by effecting an opening trade on the principal market for the security.
- **Relax the price condition for certain VWAP transactions.** Current Rule 10b-18 requires that the purchase price of the issuer purchase be no higher than the highest independent bid or the last independent transaction price, whichever is higher. The proposed rule would except from the price condition repurchases using the volume weighted average price (“VWAP”), provided the securities and repurchases meet certain conditions. This change would provide issuers with additional flexibility to conduct repurchase programs within the safe harbor, within the limits of certain criteria intended to reduce opportunities for market manipulation.
- **Limit the disqualification provision with respect to “flickering quotes.”** A flickering quote occurs when there are rapid and repeated changes in the current national best bid during the period between identification of the current national best bid and the execution or display of the issuer repurchase. Fast moving markets resulting in flickering quotes can result in an issuer executing a repurchase that inadvertently does not meet the pricing condition of the 10b-18 safe harbor. Currently, failure by the issuer to comply with any of the conditions of the rule disqualifies from the protection of 10b-18 all the issuer’s repurchases for that trading day. The proposal would limit such disqualification to only the noncompliant purchase, easing the consequences of one inadvertent violation due to the speed of the market.
- **Expand the “merger exclusion” for SPACs.** The safe harbor under current Rule 10b-18 is unavailable in connection with an acquisition by a special purpose acquisition company (“SPAC”) during the period from the public announcement of a transaction until the earlier of the

completion of the transaction or the completion of the vote by target shareholders. The proposed change would expand the merger exclusion to exclude from the safe harbor SPAC repurchases until the earlier of the completion of the transaction or the completion of the vote by *both* target shareholders *and* SPAC shareholders. This proposed change would make it more difficult for SPACs to use Rule 10b-18 to conduct a repurchase program in order to ensure shareholder approval of the proposed transaction.

The SEC has requested comments on the proposed amendments to Rule 10b-18 on or before March 1, 2010. The full text of the SEC proposing release is available at <http://www.sec.gov/rules/proposed/2010/34-61414.pdf>

Bass, Berry & Sims PLC's Trading by Insiders/Equity and Debt Repurchases Subgroup monitors and advises on developments in the area of insider reporting, insider trading policies, issuer stock repurchases and debt repurchases. If you have any questions regarding the issues addressed in this Corporate and Securities Law Advisory or if you would like to set up a meeting with us and your management team or board of directors regarding these developments, please feel free to contact your regular contacts in our Corporate and Securities Group or any of the attorneys in our Subgroups listed below.

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