

(2) By such other means as the agent may deem advisable.

(d) Mail to eligible producers whose names and addresses are known to the referendum agent, the instructions on voting, a ballot, and a summary of the terms and conditions of the proposed Order. No person who claims to be eligible to vote shall be refused a ballot.

(e) At the end of the voting period, collect, open, number, and review the ballots and tabulate the results in the presence of an agent of a third party authorized to monitor the referendum process.

(f) Prepare a report on the referendum.

(g) Announce the results to the public.

§ 1216.104 Subagents.

The referendum agent may appoint any individual or individuals necessary or desirable to assist the agent in performing such agent's functions hereunder. Each individual so appointed may be authorized by the agent to perform any or all of the functions which, in the absence of such appointment, shall be performed by the agent.

§ 1216.105 Ballots.

The referendum agent and subagents shall accept all ballots cast. However, if an agent or subagent deems that a ballot should be challenged for any reason, the agent or subagent shall endorse above their signature, on the ballot, a statement to the effect that such ballot was challenged, by whom challenged, the reasons therefore, the results of any investigations made with respect thereto, and the disposition thereof. Ballots invalid under this subpart shall not be counted.

§ 1216.106 Referendum report.

Except as otherwise directed, the referendum agent shall prepare and submit to the Administrator a report on results of the referendum, the manner in which it was conducted, the extent and kind of public notice given, and other information pertinent to analysis of the referendum and its results.

§ 1216.107 Confidential information.

The ballots and other information or reports that reveal, or tend to reveal, the vote of any person covered under the Act and the voting list shall be held confidential and shall not be disclosed.

Dated: November 2, 1998.

Robert C. Keeney,
Deputy Administrator, Fruit and Vegetable Programs.

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SECURITIES AND EXCHANGE COMMISSION

17 CFR Part 240

[Release No. 34-40617; File No. S7-27-98]

RIN: 3235-AH48

Purchases of Certain Equity Securities by the Issuer and Others

AGENCY: Securities and Exchange Commission.

ACTION: Proposed rule.

SUMMARY: The Securities and Exchange Commission (Commission) ("Commission") today is proposing for public comment an amendment to Rule 10b-18 (Rule) under the Securities Exchange Act of 1934 (Exchange Act). Rule 10b-18 provides a "safe harbor" from liability for manipulation under Sections 9(a)(2) and 10(b) of the Exchange Act, and Rule 10b-5 thereunder, when an issuer or affiliated purchaser of the issuer bids for or buys shares of its common stock in compliance with the Rule's conditions. In order to improve liquidity during severe market downturns, the proposal would amend the Rule's timing condition during the trading session immediately following a market-wide trading suspension. In particular, the safe harbor now would be available to an issuer that bids for or purchases its common stock either: from the reopening of trading until the close of trading on the same day as the imposition of the market-wide trading suspension; or at the next day's opening, if the market-wide trading suspension was in effect at the scheduled close of trading. The proposed safe harbor requires that the issuer continue to comply with the Rule 10b-18 conditions governing the manner, price and volume of market purchases of its common stock.

DATES: Comments should be submitted on or before December 7, 1998.

ADDRESSES: Interested persons should submit three copies of their written data, views and opinions to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, NW, Washington, DC 20549. Comments also may be submitted electronically at the following E-mail address: rule-comments@sec.gov. All comment letters should refer to File No. S7-27-98. All submissions will be made available for public inspection and copying at the Commission's Public Reference Room, Room 1024, 450 Fifth Street, NW, Washington DC 20549. Electronically submitted comment letters will be

posted on the Commission's Internet web site (<http://www.sec.gov>).

FOR FURTHER INFORMATION CONTACT:

James A. Brigagliano, Assistant Director; Denise Landers, Attorney; and Jerome Roche, Attorney; Office of Risk Management and Control, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549, or at (202) 942-0772.

SUPPLEMENTARY INFORMATION:

I. Introduction

In response to a petition for rulemaking (Petition)¹ filed by the New York Stock Exchange, Inc. (NYSE), the Commission is proposing to amend Rule 10b-18² to modify the timing condition during the trading session immediately following a market-wide trading suspension.³ The proposal extends the safe harbor to Rule 10b-18 bids or Rule 10b-18 purchases⁴ effected either: (i) from the reopening of trading until the close of trading immediately following, and on the same day as, a market-wide trading suspension; or (ii) at the next day's opening, if the market-wide trading suspension was in effect at the scheduled close of trading. At such times, an issuer or an affiliated purchaser of the issuer (affiliated

¹ The Petition was filed with the Commission on January 9, 1998 and is publicly available in File No. 4-409 in the Commission's Public Reference Room.

² 17 CFR 240.10b-18.

³ The proposed amendment defines market-wide trading suspension as either: (i) A market-wide trading halt imposed pursuant to the rules of a national securities exchange or a registered national securities association in response to a market-wide decline during a single trading session; or (ii) a market-wide trading halt ordered by the Commission pursuant to section 12(k) of the Exchange Act. Proposed Rule 10b-18(a)(15). For example, the proposed alternative safe harbor would apply in the trading session following a trading halt pursuant to NYSE exchange rule 80B or Market Closing Policy of the National Association of Securities Dealers, Inc. (NASD). The Commission approved the NASD's market closing policy statement, codified in IM-4120-3. Securities Exchange Act Release No. 39846 (April 9, 1998), 63 FR 18477 (April 15, 1998) (Circuit Breaker Approval Order). The Commission notes that it has a standing request with the NASD that the NASD halt trading as quickly as practicable whenever the NYSE and other markets have suspended trading, which the NASD continues to honor. See Letter to Howard L. Kramer, Senior Associate Director, Office of Market Supervision, Division of Market Regulation, Commission, from Richard Ketchum, Chief Operating Officer and Executive Vice President, NASD, dated January 23, 1998.

⁴ Rule 10b-18 bid is defined as a bid for securities that, if accepted, or a limit order to purchase securities, that if executed, would result in a Rule 10b-18 purchase. 17 CFR 240.10b-18(a)(4). A Rule 10b-18 purchase is defined as a purchase of common stock of an issuer by or for the issuer, with certain exceptions. 17 CFR 240.10b-18(a)(3).

purchaser)⁵ would still also have to comply with the manner, price and volume conditions in Rule 10b-18 to satisfy the requirements of the safe harbor.

The NYSE Petition stated that it had surveyed floor brokers, upstairs traders and listed-company representatives. Those groups agreed that expanding the Rule 10b-18 safe harbor to issuer repurchases effected during the trading session following a severe market decline could offer an important source of liquidity and provide balance to selling activity. The Commission has previously noted that issuers repurchase their securities for many legitimate reasons and that those repurchases benefit shareholders and the marketplace by providing additional liquidity.⁶ Based on these considerations, the Commission is publishing for public comment this proposed amendment to Rule 10b-18.

II. Rule 10b-18 Safe Harbor

Before Rule 10b-18 was adopted, issuers effecting repurchase programs were uncertain about their potential liability under the anti-manipulation provisions of the Exchange Act. Those provisions offer little practical guidance with respect to the scope of permissible issuer market activity.⁷ Since 1967, the Commission has considered periodically whether, and how, to regulate an issuer's market repurchases of its securities.⁸ The Commission determined that a safe harbor rule would prevent fraudulent, manipulative, and deceptive acts or practices by issuers and others without imposing unnecessarily complex and intrusive restrictions on issuer market repurchases.⁹ Rule 10b-18 grants a safe harbor from liability for manipulation under Sections 9(a)(2) and 10(b), and

Rule 10b-5, of the Exchange Act to an issuer in connection with bids for or purchases of its common stock that comply with the Rule's conditions. Because Rule 10b-18 is a safe harbor, compliance with the Rule's conditions is voluntary. Thus, issuer bids for or purchases of its common stock that do not comply with Rule 10b-18 are not necessarily manipulative.¹⁰

The Commission adopted safe harbor provisions both to ensure that the price of an issuer's repurchases would be set by independent market forces and to offer clear guidance concerning the scope of non-manipulative issuer repurchasing.¹¹ Rule 10b-18, therefore, sets out specific conditions that issuers must comply with while conducting stock repurchases.

- The *manner of purchase condition* requires an issuer to use a single broker or dealer on any given day to bid for or purchase its common stock.¹² The goal of this provision is to prevent an issuer from creating the appearance of widespread broker-dealer interest and trading activity in its security.

- The *timing condition* specifies that an issuer's purchase may not be the opening transaction reported to the consolidated transaction reporting system nor may purchases be made during the last half-hour before the scheduled close of trading.¹³ Because they tend to forecast the direction of trading and suggest the strength of demand, purchases effected at the opening or close of trading are generally considered to be a significant indication of the current market value of the security. The Rule excludes opening bids and purchases to prevent the issuer from setting the character of the day's trading. The Rule similarly excludes bids and purchases near or at the close of trading to prevent the issuer from influencing the closing price for its security.

- The *price condition* specifies the highest price an issuer may bid or pay for its common stock.¹⁴ Because the

price condition generally limits the issuer to bidding for or buying its security at a price that is no higher than the current independent published bid or last independent transaction price, it ensures that the issuer would not lead the market for its security through its repurchases.

- The *volume condition* is designed to prevent an issuer from dominating the market for its securities through substantial purchasing activity. Generally, the issuer may effect daily purchases up to 25 percent of the trading volume in its shares.¹⁵ Block purchases are excepted from the volume condition, although all other Rule 10b-18 conditions apply to block purchases.¹⁶ Therefore, an issuer may purchase one or more blocks as long as its non-block purchases amount to no more than 25 percent of the security's trading volume.

III. NYSE Petition and Proposed Amendment to Rule 10b-18

The Commission recently approved a NYSE proposal to amend its rule establishing "circuit breakers."¹⁷ Circuit breakers are coordinated market-wide trading halts that are intended to avoid systemic breakdown when a severe one-day market drop interferes with the orderly operation of the financial markets.¹⁸ The new circuit

whether the bid or purchase is effected on an exchange. *Id.*

¹⁵ For nonreported securities, volume may not exceed one round lot on a single day or on such day plus the five preceding days, 1/20th of the percent of outside shares. 17 CFR 240.10b-18(b)(4). Trading volume is defined generally as the average daily trading volume reported to the consolidated transaction reporting system or to the NASD for the security in the four calendar weeks preceding the week that the Rule 10b-18 purchase or bid is to be effected. 17 CFR 240.10b-18(a)(11).

¹⁶ Block is defined as a quantity of stock that either: (i) has a purchase price of \$200,000 or more; or (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 or, in the event that trading volume data are unavailable, is at least 20 round lots of the security and totals at least one-tenth of one percent (0.001) of the outstanding shares of the security, exclusive of any shares owned by any affiliate. Block does not include any amount a broker or dealer, acting as principal, has accumulated for the purpose of selling to the issuer or affiliated purchaser, if the issuer or affiliated purchaser knows or has reason to know that such amount was accumulated for such purpose, nor does it include any amount that a broker or dealer has sold short to the issuer, if the issuer or affiliated purchaser knows or has reason to know that the sale was a short sale. 17 CFR 240.10b-18(a)(14).

¹⁷ See Circuit Breaker Approval Order *supra* note 3. (Order approving circuit breakers for rules governing market-wide trading halts on the NYSE, American Stock Exchange, Boston Stock Exchange, Chicago Stock Exchange, NASD, and Philadelphia Stock Exchange.

¹⁸ *Id.*

⁵ The safe harbor is also available for affiliates of the issuer (affiliated purchasers). References to "issuer" in this release include affiliated purchasers.

⁶ Securities Exchange Act Release No. 19244 (Nov. 17, 1982), 47 FR 53333 (Nov. 26, 1982) (Adopting Release).

⁷ *Id.*

⁸ The Commission first proposed Rule 10b-10 to govern issuer repurchases in connection with proposed legislation that became the Williams Act Amendments of 1968. Pub. L. No. 90-439, 82 Stat. 454 (July 29, 1968), reprinted in Hearings on S. 510 before Senate Committee on Banking and Currency, 90th Cong., 1st Sess. 214-216 (1967). The Commission then published for public comment proposed Rule 13e-2 in 1970, 1973 and 1980, a proscriptive rule that would have imposed disclosure requirements, purchasing limitations and general antifraud liability. Securities Exchange Act Release Nos. 8930 (July 13, 1970), 35 FR 11410 (July 16, 1970); 10539 (Dec. 6, 1973), 38 FR 34341 (Dec. 13, 1973); and 17222 (Oct. 17, 1980), 45 FR 70890 (Oct. 27, 1980).

⁹ Adopting Release, *supra* note 6, at 53334.

¹⁰ 17 CFR 240.10b-18(c).

¹¹ Adopting Release, *supra* note 6, at 53334. Some conduct that meets the safe harbor requirement of Rule 10b-18 may still violate the anti-fraud provisions of the Exchange Act. For example, as the Commission noted in 1982 when adopting Rule 10b-18, "Rule 10b-18 confers no immunity from possible Rule 10b-5 liability where the issuer engages in repurchases while in possession of favorable, material nonpublic information concerning its securities." *Id.*, n. 5.

¹² 17 CFR 240.10b-18(b)(1). This manner condition applies only to Rule 10b-18 bids or Rule 10b-18 purchases solicited by or on behalf of the issuer.

¹³ 17 CFR 240.10b-18(b)(2).

¹⁴ 17 CFR 240.10b-18(b)(3). The price limitation varies on whether the security is a reported, exchange-traded, Nasdaq or other security, and

breaker rule sets trigger values representing a one-day decline in the Dow Jones Industrial Average (DJIA) of 10%, 20%, and 30%. It also modifies the duration of the market-wide trading halt depending on when the circuit breaker is triggered.¹⁹ Given the new trigger values, these circuit breakers would rarely be triggered, and only during significant market declines when liquidity may evaporate. In conjunction with the new circuit breaker rules, the NYSE asked the Commission to expand the Rule 10b-18 timing condition to permit issuers to bid for or purchase its security either: (1) At the reopening of trading on the same day as the trading halt, and during the half hour prior to the scheduled close of trading of such trading session; or (2) at the next day's opening, if the market-wide trading halt is in effect at the scheduled close of trading. The Petition did not propose to change the other Rule 10b-18 conditions.²⁰

The NYSE acknowledged that Rule 10b-18 is neither mandatory nor the exclusive means for an issuer to make repurchases without manipulating the market price of its securities. However, it noted that in practice many issuers are reluctant to undertake repurchases without the certainty that their bids or purchases fall within the Rule 10b-18 safe harbor. The NYSE highlighted the need for liquidity in the period following a significant market decline, and suggested that issuer repurchases offer a source of liquidity that could ease the stress of volatile markets. In October 1987 and October 1997, the markets experienced severe declines. At those times, numerous issuers sought our guidance on the applicability of Rule 10b-18 in the following trading session. The events following those market breaks underscore the significant role of issuer repurchases in enhancing liquidity during extreme market downturns and the need to clearly

communicate the applicability of Rule 10b-18 during such periods.²¹

When the Commission adopted Rule 10b-18, it recognized that issuers rarely buy back their securities with improper intent, but rather generally conduct repurchase programs for legitimate business reasons. The Commission also acknowledged the benefit of offering clear guidance and certainty to issuers and broker-dealers concerning permissible market activity when repurchasing their stock. The Rule 10b-18 safe harbor allows issuers and their broker-dealer agents to bid for and purchase their common stock within the Rule's conditions and thereby avoid the substantial and unpredictable risks of liability under the general anti-manipulation provisions of the Exchange Act. With an expanded safe harbor during the trading session following a market break, issuers may be encouraged to participate in reestablishing equilibrium between buying and selling interests. Under the proposal, the safe harbor would also be available in the trading session following a market-wide trading suspension declared pursuant to a Commission emergency order.²²

The Commission weighed its concerns about potential manipulative activity by issuers against the benefits of facilitating short-term liquidity during periods of severe market turbulence. We found that the balance tips in favor of enhanced liquidity. Thus, we are publishing for public comment the amendment to Rule 10b-18 substantially as proposed by the NYSE. Rule 10b-18 would continue to state that no presumption of manipulation arises for issuer purchases of its securities made outside the Rule 10b-18 conditions.²³

IV. Request for Public Comment

The Commission seeks comment generally on adopting the proposal. The Commission asks commenters to address whether the proposed amendment provides appropriate safe harbor conditions for issuers and affiliated purchasers in times of severe

market downturns. The Commission seeks comment on whether there are any risks of manipulation that this proposal may raise. Commenters may also wish to discuss whether there are any legal or policy reasons why the Commission should consider a different approach.²⁴ For instance, should volume limits also be relaxed and/or should specific disclosure of issuer repurchases be required? Further, should the time of purchase condition under the proposed safe harbor be broader, narrower, or include different parameters? The Commission encourages commenters to provide information regarding the functioning of secondary markets during periods of market volatility, the roles of market participants, and the advantages and disadvantages of the proposed amendments. For purposes of the Small Business Regulatory Enforcement Fairness Act of 1996, the Commission also requests information regarding the potential impact of the proposed amendment on the economy on an annual basis. If possible, commenters should provide empirical data to support their views. Comments should be submitted by December 7, 1998.

V. Costs and Benefits of the Proposed Amendments

The Commission has identified certain costs and benefits relating to the proposals, which are discussed below, and encourages commenters to discuss any additional costs or benefits. In particular, the Commission requests comment on the potential costs for any necessary modifications to information gathering, management, and record-keeping systems or procedures, as well as any potential benefits resulting from the proposals for issuers, investors, broker-dealers, securities industry professionals, regulators or others. Commenters should provide analysis and data to support their views on the costs and benefits associated with the proposals.

A. Benefits

The Commission preliminarily believes that the proposed amendments generally would help improve the liquidity of markets for equity securities following a market-wide trading suspension. Securities sellers would benefit from improved liquidity while issuers could buy shares at relatively low prices. We preliminarily believe that the specific benefits set forth below

¹⁹ *Id.* NYSE Rule 80B governs the imposition of trading halts on the NYSE due to extraordinary market volatility. Rule 80B provides both the trigger values (circuit breakers) for trading halts on the NYSE, which are expressed as a decline in the DJIA from the closing value on the previous trading day, and the duration of the trading halt for each circuit breaker. The circuit breakers contained in Rule 80B have been coordinated with: (i) All other U.S. stock exchanges and the National Association of Securities Dealers with respect to trading of stocks, stock options, and stock index options; and (ii) all U.S. futures exchanges with respect to the trading of stock index futures and options on such futures, so that all such markets would cease trading when a circuit breaker is triggered by a decline in the DJIA.

²⁰ See Petition, *supra* note 1.

²¹ See, "Bargain-Shopping Through Buybacks", *New York Times*, August 6, 1998, p. D 6.

²² Section 12(k) of the Exchange Act gives the Commission special authority to respond to market disruptions and extreme market volatility that could result from a variety of contingencies. Section 12(k)(1)(B) authorizes the Commission summarily to suspend all trading in the markets, for up to ninety calendar days when such suspension is required by the public interest and for the protection of investors. The Commission has never invoked this provision of section 12(k).

²³ The proposed alternative safe harbor conditions would be codified in Rule 10b-18(c); and current paragraph (c) would be amended and redesignated as paragraph (d).

²⁴ Additionally, the Commission expects to consider broad revisions to Rule 10b-18 in the near future, covering the manner, timing, price and volume conditions in Rule 10b-18 and seeks comment on Rule 10b-18 generally.

would flow from the proposed amendments.

The Commission preliminarily believes that the proposal will facilitate trading in the issuer's securities by reducing issuer reluctance to purchase in response to sell-side order imbalances that may occur during periods of severe market declines. The proposed amendments, by extending the safe harbor, may encourage issuers to purchase their securities at a time when other market participants may be unable or unwilling to do so. We preliminarily believe that extending the safe harbor to issuers under the conditions following a market-wide trading suspension will improve the liquidity of markets in the issuer's securities. The Commission requests data and analysis on what effect the proposed changes may have on the liquidity of these markets.

The proposed safe harbor also provides clarity as to the scope of permissible market activity for issuers and the broker-dealers that assist issuers in their stock repurchases. If an issuer effects its repurchases in compliance with the conditions of Rule 10b-18, it will avoid what might otherwise be substantial and unpredictable risks of liability under the anti-manipulative provisions of the Exchange Act.

The Commission does not have data to quantify the value of the benefits described above. The Commission seeks comments on how it may quantify these benefits and any other benefits, not already identified, that may result from the adoption of these proposed amendments.

B. Costs

The Commission notes that the costs related to complying with Rule 10b-18, and the proposed amendment, are assumed voluntarily because the rule provides an optional rather than mandatory safe harbor that issuers may use for purchasing their securities.

The Rule implicitly requires an issuer seeking to avail itself of the safe harbor to collect information regarding the manner, timing, price, and volume of its purchases of the issuer's common stock, on a transaction by transaction basis, in order to verify compliance with the Rule's safe harbor conditions. We estimate that each year there are approximately 1,455 issuers effecting 1,730 share repurchase programs; or, on average, 1.2 repurchase programs per issuer, in accordance with Rule 10b-18.²⁵ For each such repurchase program, an issuer spends an average of

approximately 8 hours collecting the requisite information, for a total burden of 13,840 burden hours. We estimate that each issuer spends \$670 per repurchase program to comply with the safe harbor requirements.²⁶ We have no way of estimating the average number of market-wide trading halts per year or the number of issuers that would avail themselves of the safe harbor in the subsequent trading session. With regard to issuer repurchases permitted under the proposed amendment to Rule 10b-18, the Commission anticipates that the triggering of a market-wide trading suspension would occur infrequently. However, the Commission estimates that, if one market-wide trading suspension occurs each year, each issuer would incur an additional burden of 1 hour for a cost, per issuer, of approximately \$83.75.²⁷

The Commission seeks comments, data and analysis on the cost estimates identified in this section and comments on any cost, not already identified, on the proposed amendment.

VI. Effects on Efficiency, Competition, and Capital Formation

In adopting rules under the Exchange Act, section 23(a)(2) requires the Commission to consider the impact any rule would have on competition. Further, the law requires that the Commission not adopt any rule that would impose a burden on competition not necessary or appropriate in furtherance of the purposes of the Exchange Act. Section 3(f) of the Exchange Act requires the Commission, when engaged in rulemaking, and when considering the public interest, to consider whether the action would promote efficiency, competition, and capital formation.²⁸

The Commission preliminarily believes that the safe harbor should improve market efficiency by providing additional purchasers, namely issuers, during a time of selling order imbalance. That effect could enhance market liquidity following a market-wide trading suspension.

²⁶ The estimated average cost of \$670 to comply with the requirements of the safe harbor is composed of \$96 for collection of information by an issuer (4 hours at \$24 per hour), \$400 for review of the information (4 hours at \$100 per hour), and \$174 for printing, supplies, and copying (approximately 35% of the total labor costs). The Commission estimates overhead based on 35% of total labor costs based on the *GSA Guide to Estimating Reporting Costs* (1973).

²⁷ The estimated total average burden per issuer is 8 burden hours per repurchase program. The estimated additional cost of \$83.75 per issuer is calculated from each issuer effecting an average of 1 repurchase program per year at a cost of \$670 per repurchase program divided by 8 hours.

²⁸ 15 U.S.C. 78c(f).

The Commission's preliminary view is that the proposed amendment to the Rule 10b-18 would not have any anticompetitive effect because it would apply equally to all issuers and the safe harbor would only be triggered in extremely rare circumstances. Further, an issuer currently is able to purchase its shares outside the Rule 10b-18 safe harbor conditions without raising a presumption of manipulation.

The Commission requests comments on the effect on competition that may result to issuers under the proposed amendments to the Rule. Finally, the Commission seeks comment on what impact the proposals, if adopted, would have on efficiency and capital formation.

VII. Initial Regulatory Flexibility Analysis

The Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA)²⁹ regarding the proposed amendments to Rule 10b-18.

A. Reasons for the Proposed Action

On January 9, 1998, the NYSE filed a petition for rulemaking with the Commission pursuant to Rule 192 of the Commission's Rules of Practice.³⁰ The NYSE requested that the Commission initiate rulemaking proceedings to amend Rule 10b-18 to include in its safe harbor bids and purchases made following a market-wide trading suspension: (1) at the reopening on the day of the market-wide trading suspension; (2) during the half-hour prior to the scheduled close of trading on the day of the trading suspension; and (3) at the next day's opening if the market-wide trading suspension is in effect at the scheduled close of trading. The proposed conditions adjust the Rule's time of purchase condition but also provide that the issuer must continue to comply with the other Rule 10b-18 conditions governing the manner, price and volume of market purchases of its common stock.

B. Objectives

The proposed amendments will allow issuers who otherwise comply with the current Rule 10b-18 safe harbor conditions governing manner, price and volume to use the proposed timing condition during the trading session following an emergency market-wide trading suspension. The events following the market breaks in October 1987 and October 1997 have underscored the significant role of issuer repurchases during market

²⁵ The Commission estimates that 1,225 issuers effect single repurchase programs while 230 issuers effect multiple repurchase programs.

²⁹ 5 U.S.C. § 603.

³⁰ See Petition, *supra* note 1.

downturns and the need for clarity as to the applicability of Rule 10b-18 in periods of extreme market downturns. On those occasions, issuer repurchases provided an important source of liquidity that helped ease market stress. The proposal, by modifying the safe harbor's timing condition during the trading session following a market break, may improve liquidity and facilitate market participants' ability to reestablish equilibrium between buying and selling interests.

C. Legal Basis

The amendments to Rule 10b-18 are proposed pursuant to the authority set forth in Sections 9(a)(2) and 10(b) of the Securities Exchange Act of 1934.³¹

D. Small Entities Subject to the Rule

The proposed amendments may affect those small entity issuers and affiliated purchasers that wish to avail themselves of the safe harbor provisions with the conditions following a market-wide trading suspension. Based on Exchange Act Rule 0-10(a), a small issuer is one that on the last day of its most recent fiscal year had total assets of \$5,000,000 or less. The Commission estimates that approximately 1,450 issuers will avail themselves of the safe harbor each year, of which about 10 may be considered small entities. The Commission seeks comment on the number of issuers engaged in market repurchases of its stock and the number of such issuers that are small entities.

E. Reporting, Recordkeeping and Other Compliance Requirements

The proposed amendments would not impose any new reporting, recordkeeping, or other compliance requirements.

F. Duplicative, Overlapping or Conflicting Federal Rules

The Commission believes that there are no rules that duplicate, overlap, or conflict with, the proposed amendments.

G. Significant Alternatives

The Regulatory Flexibility Act directs the Commission to consider significant alternatives that would accomplish the stated objective, while minimizing any significant adverse impact on small issuers and broker-dealers. In connection with the proposed rule, the Commission considered the following alternatives: (a) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small

entities; (b) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (c) the use of performance rather than design standards; and (d) an exemption from coverage of the rule, or any part thereof, for small entities.

With respect to the proposed amendments, the Commission believes that the establishment of different requirements for small entities is neither necessary nor practicable, because the proposal provides voluntary safe harbor from liability for manipulation under the Exchange Act. The proposed rule should not adversely affect small entities because it does not impose any new reporting, recordkeeping or compliance requirements. Therefore, it is not feasible to further clarify, consolidate or simplify the rule for small entities.

H. Solicitation of Comments

The Commission encourages the submission of comments with respect to any aspect of this IRFA. The Commission specifically requests comments on the number of issuers conducting repurchase programs and the number of such issuers that are small entities. Such comments will be considered in the preparation of the Final Regulatory Flexibility Analysis, if the proposed amendments are adopted, and will be placed in the same public file as comments on the proposed amendments themselves. Comments should be submitted in triplicate to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Stop 6-9, Washington, D.C. 20549. Comments also may be submitted electronically at the following E-mail address: rule-comments@sec.gov. All comment letters should refer to File No. S7-27-98; this file number should be included on the subject line if E-mail is used. Comment letters will be available for public inspection and copying in the Commission's Public Reference Room, 450 Fifth Street, N.W., Washington, D.C. 20549. Electronically submitted letters also will be posted on the Commission's Internet web site (<http://www.sec.gov>).

VIII. Paperwork Reduction Act

Certain provisions of the proposed amendments contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 (PRA);³² the Commission has submitted them to the Office of Management and Budget for review in accordance with 44 U.S.C. 3507(d) and

5 CFR 1320.11. The title for the collection of information is: "Purchases of certain equity securities by the issuer and others." This collection of information has previously been assigned OMB Control No. 3235-0474.

Rule 10b-18 provides that an issuer or any affiliated purchaser of an issuer will not incur liability under Sections 9(a)(2) and 10(b) of the Exchange Act, or Rule 10b-5 under the Exchange Act if its purchases of the issuer's common stock are made in compliance with the manner, timing, price, and volume limitations of the rule. The proposed amendments to the Rule provide conditions to the safe harbor applicable during the trading session following a market-wide trading suspension. An agency may not sponsor, conduct, or require response to an information collection unless a currently valid OMB control number is displayed.

The Rule implicitly requires an issuer or an affiliated purchaser seeking to avail itself of the safe harbor to collect information regarding the manner, time, price and volume of its purchases of the issuer's common stock, on a transaction by transaction basis, in order to verify compliance with the rule's safe harbor conditions. The Commission estimates that each year there are approximately 1,455 issuers effecting 1,730 share repurchase programs, or on average 1.2 repurchase programs per issuer per year, in accordance with Rule 10b-18 safe harbor. For each such repurchase program, an issuer spends an average of approximately 8 hours collecting the requisite information, for a total burden of 13,840 burden hours.³³ With regard to issuer repurchases permitted under the proposed amendment to Rule 10b-18, the Commission anticipates that the triggering of a market-wide trading suspension would occur infrequently. However, for purposes of the PRA, if we assume that, at most, one market-wide trading suspension occurs each year, each issuer would incur an additional burden of 1 hour for a cost per issuer of approximately \$83.75.³⁴ If 1,455 issuers engage in repurchases following a market-wide trading halt and comply with the safe harbor, then collectively these issuers would incur an additional 1,455 burden hours.

The issuer's decision to effect purchases of its common stock within the safe harbor is voluntary. All records required to be preserved are considered confidential and are not available to the

³³ This represents 1,730 repurchase programs requiring 8 burden hours for compliance.

³⁴ This number was derived by dividing the estimated average cost of \$670 per issuer per repurchase program to comply with the safe harbor requirements by 8 hours. See, *supra* note 26.

³¹ 15 U.S.C. §§ 78i(a)(2), 78j(b).

³² 44 U.S.C. § 3501 *et seq.*

public. All records required under the proposed amendments to Rule 10b-18 would be preserved for not less than 3 years, the first 2 years in an easily accessible place.

Pursuant to 44 U.S.C. 3506(c)(2)(B), the Commission solicits comments to:

(i) Evaluate whether the proposed information collection is necessary for the proper performance of the agency's functions, including whether the information shall have practical utility;

(ii) Evaluate the accuracy of the agency's estimate of the burden of the proposed collections of information;

(iii) Enhance the quality, utility, and clarity of the information to be collected;

(iv) Minimize the burden of the collections of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology.

Persons desiring to submit comments on the collection of information requirements should direct them to the Office of Management and Budget, Attention: Desk Officer for the Securities and Exchange Commission, Office of Information and Regulatory Affairs, Washington, D.C. 20503, and should also send a copy of their comments to Jonathan G. Katz, Secretary, Securities and Exchange Commission, 450 Fifth Street, N.W., Stop 6-9, Washington, D.C. 20549 with reference to File No. S7-27-98. OMB is required to make a decision concerning the collections of information between 30 and 60 days after publication, so a comment to OMB is best assured of having its full effect if OMB receives it within 30 days of publication.

IX. Statutory Basis and Text of Proposed Amendment

The rule amendment is being proposed pursuant to Sections 2, 3, 9(a)(6), 10(b), 13(e), 15(c) and 23(a), 15 U.S.C. 78b, 78c, 78i(a)(6), 78j(b), 78m(e), 78o(c) and 78w(a).

List of Subjects in 17 CFR Part 240

Broker-dealers, Issuers, Securities.

For the reasons set forth in the preamble, Title 17, Chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

1. The authority citation to Part 240 continues to read in part as follows:

Authority: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z-2, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78d, 78f, 78i, 78j, 78j-1, 78k, 78k-1, 78l,

78m, 78n, 78o, 78p, 78q, 78s, 78u-5, 78w, 78x, 78ll(d), 78mm, 79q, 79t, 80a-20, 80a-23, 80a-29, 80a-37, 80b-3, 80b-4 and 80b-11, unless otherwise noted.

* * * * *

2. Section 240.10b-18 is amended by adding paragraphs (a)(15) and (d) and revising paragraph (c) to read as follows:

§ 240.10b-18 Purchases of certain equity securities by the issuer and others.

(a) *Definitions.* * * *

(15) The term *market-wide trading suspension* means either:

(i) A market-wide trading halt imposed pursuant to the rules of a national securities exchange or a registered national securities association, in response to a market-wide decline during a single trading session; or

(ii) A market-wide trading suspension ordered by the Commission pursuant to Section 12(k) of the Act, 15 U.S.C. 78l(k).

* * * * *

(c) *Conditions following a market-wide trading suspension.*

(1) The conditions of paragraph (b) of this section shall apply in connection with a Rule 10b-18 bid or a Rule 10b-18 purchase effected during a trading session following the termination of a market-wide trading suspension, except that the time of purchase condition in paragraph (b)(2) of this section shall not apply, either:

(i) From the reopening of trading until the scheduled close of trading; or

(ii) At the opening of trading on the next trading day, if a market-wide trading suspension is in effect at the scheduled close of a trading session.

(d) No presumption shall arise that an issuer or affiliated purchaser of an issuer has violated the anti-manipulation provisions of sections 9(a)(2) or 10(b) of the Act, 15 U.S.C. 78i(a)(2) or 78j(b), or § 240.10b-5, if the Rule 10b-18 bids or Rule 10b-18 purchases of such issuer or affiliated purchaser do not meet the conditions specified in paragraph (b) or (c) of this section.

* * * * *

By the Commission.

Dated: October 29, 1998.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 98-29510 Filed 11-5-98; 8:45 am]

BILLING CODE 8010-01-P

DEPARTMENT OF ENERGY

Federal Energy Regulatory Commission

18 CFR Parts 4, 153, 157, and 375

[Docket No. RM98-16-000]

Collaborative Procedures for Energy Facilities Applications; Notice of Technical Conferences

October 30, 1998.

AGENCY: Federal Energy Regulatory Commission.

ACTION: Notice of Technical Conferences.

SUMMARY: The Federal Energy Regulatory Commission (Commission) intends to hold staff technical conferences to discuss the proposed pre-filing collaborative process.

DATES: Conference will be held at 9:00 a.m. on November 10, 1998, in Houston, Texas and at 9:00 a.m. on November 18, 1998, in Chicago, Illinois.

ADDRESSES: Conference locations are as follows:

Houston Airport Marriott, 18700 Kennedy Boulevard, Houston, Texas
Chicago Marriott Downtown, 540 North Michigan Avenue, Chicago, Illinois

FOR FURTHER INFORMATION CONTACT:

Thomas Russo, Office of Pipeline Regulation, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, (202) 219-2792

Berne Mosley, Office of Pipeline Regulation, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, (202) 208-2256

Gordon Wagner, Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, (202) 219-0122

Merrill Hathaway, Office of the General Counsel, Federal Energy Regulatory Commission, 888 First Street, N.E., Washington, D.C. 20426, (202) 208-0825

SUPPLEMENTARY INFORMATION: In addition to publishing the full text of this document in the **Federal Register**, the Commission also provides all interested persons an opportunity to inspect or copy the contents of this document during normal business hours in the Public Reference Room at 888 First Street, N.E., Room 2A, Washington, D.C. 20426.

The Commission Issuance Posting System (CIPS) provides access to the texts of formal documents issued by the Commission. CIPS can be accessed via