

## SEC Issues Emergency Order to Ease Restrictions on Issuer Repurchases

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On September 18, 2008, the Securities and Exchange Commission (the “SEC”) issued an emergency order easing the timing and volume conditions to the safe harbor provided by Rule 10b-18 under the Securities Exchange Act of 1934, as amended (the “Exchange Act”), in an attempt to provide additional flexibility and certainty to issuers that are considering repurchasing their common shares during current market conditions.<sup>1</sup> This order was issued with two other SEC emergency orders on September 18, 2008, the first temporarily halting most short sales of publicly-traded shares of certain financial firms and the second temporarily requiring certain institutional investment managers to report information concerning daily short sales.<sup>2</sup> The SEC also issued an emergency order on September 17, 2008 to strengthen its ban on “naked” short selling.<sup>3</sup>

### *What is Exchange Act Rule 10b-18?*

Rule 10b-18 provides issuers (and affiliated purchasers) that repurchase their common shares in the open market with a “safe harbor” from liability for manipulation under

Section 9(a)(2) of the Exchange Act or Rule 10b-5 under the Exchange Act. The safe harbor is available when the issuer complies with the manner, timing, price and volume limitations set forth in Rule 10b-18. The Rule does not, however, relieve an issuer of any duty it may have to disclose material, non-public information in connection with a repurchase.

### *How does the emergency order change Rule 10b-18?*

The emergency order provides two temporary exceptions to the conditions of Rule 10b-18. The first exception suspends the time of purchase restrictions contained in Rule 10b-18(b)(2)(i), (ii) and (iii), which provide that Rule 10b-18 is not available for purchases that are:

- the opening (regular way) purchase reported in the consolidated system;

*For more information regarding the emergency order, please contact your regular Vorys attorney or a member of the Vorys Corporate and Finance Group by calling 614.464.6400.*

<sup>1</sup> SEC Release No. 34-58588 (Sept. 18, 2008) is available at <http://www.sec.gov/rules/other/2008/34-58588.pdf>.

<sup>2</sup> See SEC Release No. 34-58592 (Sept. 18, 2008), as amended by Release No. 58611 (Sept. 21, 2008), and SEC Release No. 34-58591 (Sept. 18, 2008), as amended by Release No. 58591A (Sept. 21, 2008).

<sup>3</sup> See SEC Release No. 34-58572 (Sept. 17, 2008).

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- effected during the 10 minutes before the scheduled close of the primary trading session in the principal market for the security, and the 10 minutes before the scheduled close of the primary trading session in the market where the purchase is effected, for a security that has an ADTV<sup>4</sup> value of \$1 million or more and a public float value of \$150 million or more; and
- effected during the 30 minutes before the scheduled close of the primary trading session in the principal market for the security, and the 30 minutes before the scheduled close of the primary trading session in the market where the purchase is effected, for all other securities.

The second exception modifies the volume condition set forth in Rule 10b-18(b)(4) by increasing the amount of Rule 10b-18 purchases in any one day from 25% to 100% of the ADTV.

All other provisions of Rule 10b-18, including the manner and price of purchase conditions, remain in effect and were not altered by the emergency order. These conditions generally provide, with certain exceptions, that Rule 10b-18 purchases must be effected (1) through only one broker or dealer on any single day and (2) at a purchase price that does not exceed the highest independent bid or the last independent transaction price, whichever is higher, quoted or reported in the consolidated system at the time the Rule 10b-18 purchase is effected.

***When do the changes to Rule 10b-18 begin and end?***

The SEC's emergency order became effective at 12:01 a.m. EDT on September 19, 2008 and will terminate at 11:59 p.m. on October 2, 2008, unless further extended by the SEC.

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<sup>4</sup> Under Rule 10b-18, "ADTV" means the average daily trading volume reported for the security during the four calendar weeks preceding the week in which the Rule 10b-18 purchase is to be effected.

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