

Capital Markets

Skadden

Rule 10b-18 Safe Harbor for Stock Repurchases

Rule 10b-18 non-exclusive safe harbor	Rule 10b-18 provides an issuer and its affiliated purchasers with a non-exclusive safe harbor from liability under certain market manipulation rules and Rule 10b-5 under the Securities Exchange Act of 1934, as amended (Exchange Act) when repurchases of the issuer's common stock satisfy the Rule's conditions.
Who can take advantage of the safe harbor	<ul style="list-style-type: none">- Rule 10b-18 applies to an issuer and its affiliated purchasers.- An "affiliated purchaser" is defined as a person acting in concert with the issuer for the purpose of acquiring the issuer's securities, or any affiliate that, directly or indirectly, controls the issuer's Rule 10b-18 purchases, whose purchases are controlled by, or are under common control with, those of the issuer. Affiliates may include directors, officers and significant shareholders.
Securities protected by the safe harbor	<ul style="list-style-type: none">- Rule 10b-18 generally only applies to open market purchases by an issuer or its affiliated purchasers of the issuer's common stock or any equivalent interests.- Rule 10b-18 does not apply to preferred stock, convertible debt or options.
Rule 10b-18 conditions: manner, time, volume and price	<p>The repurchases must satisfy each of the four conditions below on a daily basis, at the time each order is executed (not at the time the order is entered):</p> <ol style="list-style-type: none">1. Manner: All bids and purchases by the issuer and all affiliated purchasers must be made only through one broker or dealer on any single day.2. Time: The purchases must not:<ul style="list-style-type: none">• Constitute the opening transaction;• For a security that, during the preceding four weeks, has a dollar value of average daily trading volume¹ (ADTV) of at least \$1 million and a public float² of at least \$150 million, be made during the 10 minutes before the close of trading in the security's principal market, and during the 10 minutes before the close of trading in the market where the purchase is made; and• For all other securities, be made during the 30 minutes before the close of trading in the security's principal market, and the 30 minutes before the close of trading in the market where the purchase is made.3. Volume:<ul style="list-style-type: none">• On any given day, the aggregate purchases must not exceed 25% of the security's ADTV.³• One block⁴ per week exception: Once per week, in lieu of purchasing up to 25% of the ADTV limit for that day, an issuer or its affiliated purchasers may make one block trade without regards to the volume limit, provided that it does not make any other Rule 10b-18 purchases on the same day.4. Price: Purchases must not be made at a price that exceeds the highest of:<ul style="list-style-type: none">• The highest independent bid; and• The last independent transaction price quoted or reported in the consolidated system.
Not an absolute safe harbor	Rule 10b-18 does not provide an absolute safe harbor from liability from violations of the Exchange Act. For example, Rule 10b-18 does not confer immunity from Rule 10b-5 liability where a repurchase is made while in possession of material non-public information.
Other practical considerations	<ul style="list-style-type: none">- Stock repurchase programs should generally be approved by the board.- Consider state law restrictions on stock repurchases (e.g., surplus rules - DGCL Section 160).- Consider publicly announcing the adoption of a material stock repurchase program.- Issuers are required to disclose the total number of shares repurchased in each quarter, the average price paid per share, the number of shares purchased as part of a publicly announced repurchase plan and the number of shares yet to be purchased under the plan in its Forms 10-Q and 10-K.- Consider any Regulation M (restriction on an issuer's ability to purchase shares that are the subject of a 'distribution') implications on any share repurchases.- Consider any restricted payment or other contractual limitations on stock repurchases.

¹ The SEC has stated that in calculating the dollar value of ADTV, any reasonable and verifiable method may be used. It is generally derived from multiplying each day's volume of shares (the volume publicly reported during the four calendar weeks preceding the week in which the Rule 10b-18 purchase is effected) by the closing price on that day, but may also be derived from multiplying the number of shares by the price in each trade.

² Public float refers to the aggregate market value of common equity securities held by non-affiliates of the issuer. This can be calculated using the number of securities held by non-affiliates (which can be obtained from the front page of the issuer's most recently filed Form 10-K or proxy statement) multiplied by the current share price.

³ The ADTV is to be calculated on a per share basis (as opposed to a dollar basis).

⁴ A "block" trade means stock that (i) has a purchase price of at least \$200,000, (ii) at least 5,000 shares with a purchase price of at least \$50,000 or (iii) a quantity of stock that is at least 20 round lots (a round lot is generally defined as 100 shares) of the security and totals 150% or more of the trading volume for that security.