

Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule; effective date of OMB control numbers.

**SUMMARY:** This rule makes effective the collection-of-information requirements in the final rule implementing procedures for the testing and certification of bycatch reduction devices (BRDs) for use in shrimp trawls in the exclusive economic zone in the Gulf of Mexico published in the *Federal Register* on July 13, 1999. OMB has approved those collection-of-information requirements.

**DATES:** The collection-of-information requirements in § 622.41(h)(3)(i) and (h)(3)(ii), Appendix—Gulf of Mexico Bycatch Reduction Device Testing Protocol Manual, and Appendix I—Qualifications of Observer are effective September 29, 1999.

**FOR FURTHER INFORMATION CONTACT:** Steve Branstetter, 727-570-5305.

**SUPPLEMENTARY INFORMATION:** On July 13, 1999, NMFS published a final rule (64 FR 37690) that established procedures for the testing and certification of BRDs for use in shrimp trawls in the exclusive economic zone in the Gulf of Mexico. That final rule was published prior to OMB's approval of the information collection requirements in § 622.41(h)(3)(i) and (h)(3)(ii), Appendix—Gulf of Mexico Bycatch Reduction Device Testing Protocol Manual, and Appendix I—Qualifications of Observer; therefore, the effectiveness of those information collection requirements was deferred pending OMB approval. Those information collection requirements are related to the BRD certification process and include applications for pre-certification and certification of a new BRD, pre-certification adjusting, the testing itself, the submission of the test results, application for observer position, and references for observers. On August 20, 1999, OMB approved those information collection requirements. This notice informs the public of the OMB approval of those information collection requirements under OMB control number 0648-0345 and makes them effective.

**List of Subjects**

15 CFR Part 902

Reporting and recordkeeping requirements.

50 CFR Part 622

Fisheries, Fishing, Puerto Rico, Reporting and recordkeeping requirements, Virgin Islands.

Dated: September 22, 1999.

**Andrew A. Rosenberg,**  
*Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.*

For the reasons set out in the preamble, 15 CFR part 902 is amended as follows:

**15 CFR Chapter IX**

**PART 902—NOAA INFORMATION COLLECTION REQUIREMENTS UNDER THE PAPERWORK REDUCTION ACT: OMB CONTROL NUMBERS**

1. The authority citation for part 902 continues to read as follows:

**Authority:** 44 U.S.C. 3501 *et seq.*

2. In § 902.1, paragraph (b) table, under 50 CFR, the following entries are added in numerical order to read as follows:

**§ 902.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.**

CFR part or section where the information collection requirement is located	Current OMB control number (All numbers begin with 0648-)
50 CFR	
622.41	-0345

[FR Doc. 99-25237 File 9-28-99; 8:45 am]

BILLING CODE 3510-22-F

**SECURITIES AND EXCHANGE COMMISSION**

**17 CFR Part 240**

[Release No. 34-41905; File No. S7-27-98]

RIN 3235-AH48

**Purchases of Certain Equity Securities by the Issuer and Others**

**AGENCY:** Securities and Exchange Commission.

**ACTION:** Final rule.

**SUMMARY:** The Securities and Exchange Commission (Commission) today is adopting 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 amendment modifies the Rule's timing condition during the trading session immediately following a market-wide trading suspension. In particular, the safe harbor now is 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 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.

**EFFECTIVE DATE:** October 29, 1999.

**FOR FURTHER INFORMATION CONTACT:** James A. Brigagliano, Assistant Director; and Joan Collopy, Attorney; Office of Risk Management and Control, Division of Market Regulation, Securities and Exchange Commission, 450 Fifth Street, N.W., Washington, D.C. 20549-1001, or at (202) 942-0772.

**SUPPLEMENTARY INFORMATION:**

**I. Introduction**

On October 29, 1998, in response to a petition for rulemaking (Petition)<sup>1</sup> filed by the New York Stock Exchange, Inc. (NYSE), the Commission proposed to amend the Rule 10b-18 timing condition during the trading session immediately following a market-wide trading suspension (Proposing Release).<sup>2</sup> The amendment would

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

<sup>2</sup> The amendment, as proposed and adopted, 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 suspension ordered by the Commission pursuant to Section 12(k) of the Exchange Act. Rule 10b-18(a)(15). For example, the 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

extend the safe harbor to Rule 10b-18 bids or Rule 10b-18 purchases<sup>3</sup> 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. 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.<sup>4</sup> At such times, an issuer and its affiliated purchasers<sup>5</sup> 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.

We received letters from seven commenters in response to the Proposing Release, all of which supported the amendment.<sup>6</sup> After considering the comments, we are adopting the amendment to Rule 10b-18 substantially as proposed.

## II. Rule 10b-18 Safe Harbor

Before Rule 10b-18 was adopted, issuers conducting 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. Since 1967, the Commission has periodically

considered whether, and how, to regulate an issuer's market repurchases of its securities.<sup>7</sup> As adopted in 1982, Rule 10b-18 provides 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 its bids for or purchases of its common stock that comply with the Rule's conditions.<sup>8</sup> 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.<sup>9</sup>

The following Rule 10b-18 safe harbor conditions both ensure that the price of an issuer's repurchases will be set by independent market forces and offer clear guidance concerning the scope of non-manipulative issuer repurchasing:

- 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.<sup>10</sup> This provision deters an issuer from creating the appearance of widespread broker-dealer interest and trading activity in its security.

- The *price condition* specifies the highest price an issuer may bid or pay for its common stock.<sup>11</sup> 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, excluding block purchases, in an amount up to 25 percent of the trading volume in its shares.<sup>12</sup> Although excepted from the volume condition, all other Rule 10b-18 conditions apply to block purchases.<sup>13</sup>

- 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.<sup>14</sup> 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 significant indicators of the current market value of the security. Therefore the safe harbor does not cover opening bids and purchases and bids and purchases near or at the close of trading by the issuer.

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

Last year, the Commission approved a proposal by the NYSE and other self-regulatory organizations to amend their rules establishing "circuit breakers."<sup>15</sup>

FR 18477 (April 15, 1998) (Circuit Breaker Approval Order). See generally, Securities Exchange Act Release No. 40617 (October 29, 1998), 63 FR 59911 (November 6, 1998) (Proposing Release).

<sup>3</sup> 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).

<sup>4</sup> Section 12(k) of the Exchange Act gives the Commission 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 to suspend summarily 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.

<sup>5</sup> The safe harbor is also available for affiliates of the issuer (affiliated purchasers). In this release, the term "issuer" includes affiliated purchasers.

<sup>6</sup> The comment letters and a summary of comments prepared by the Division of Market Regulation have been placed in Public File No. S7-27-98, which is available for public inspection in the Commission's Public Reference Room. Comment letters were received from the New York Stock Exchange, Inc. (NYSE); American International Group, Inc. (AIG); Morgan Stanley & Co. (Morgan Stanley); Intel Corporation (Intel); the National Association of Securities Dealers, Inc. (NASD); BellSouth Corporation (BellSouth).

<sup>7</sup> 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. Rule 13e-2 would have been a proscriptive rule with disclosure requirements, purchasing limitations and general anti-fraud 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).

<sup>8</sup> Adopting Release, *supra* note 1, 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.*, note 5.

<sup>9</sup> 17 CFR 240.10b-18(c).

<sup>10</sup> 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.

<sup>11</sup> 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 whether the bid or purchase is effected on an exchange. *Id.*

<sup>12</sup> 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).

<sup>13</sup> 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).

<sup>14</sup> 17 CFR 240.10b-18(b)(2).

<sup>15</sup> See Circuit Breaker Approval Order, *supra* note 2. (Order approving circuit breakers for rules

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.<sup>16</sup> The new circuit 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.<sup>17</sup> It is likely these circuit breakers will 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 an issuer 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.<sup>18</sup>

In its Petition, 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.

We have noted before that issuers rarely buy back their securities with improper intent, at least in the absence of a significant corporate transaction by

the issuer,<sup>19</sup> but generally conduct repurchase programs for legitimate business reasons.<sup>20</sup> We also recognize 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 risks of liability under the general anti-manipulation provisions of the Exchange Act. Expanding the safe harbor during the trading session following a market break may encourage issuers to participate in reestablishing equilibrium between buying and selling interests.

#### IV. Response to Comments on the Proposed Amendment to Rule 10b-18

In the Proposing Release, the Commission sought comment on whether the proposed amendment provides an appropriate safe harbor condition for issuers and their affiliated purchasers during periods of severe market downturns. The Commission also sought comment on whether the proposal raised a risk of manipulation and whether legal or policy reasons would suggest the Commission should consider a different approach.

The Commission received letters from seven commenters in response to the Proposing Release. All commenters supported the proposal's revision of the timing condition as facilitating short-term liquidity and providing issuers flexibility during periods of severe market downturns. Most commenters observed that the presence of issuers provide an important source of liquidity, or buy-side interest, during volatile markets when investors may wish to liquidate their securities holdings. Several commenters observed that the proposal would also assist specialists and market makers in eliminating sell-order imbalances and reestablishing market equilibrium.<sup>21</sup> Commenters stated that Rule 10b-18's silence as to the scope of permissible issuer activity during volatile markets in practice prevents issuers from buying

back their shares during severe market declines.<sup>22</sup>

Four commenters recommended raising the volume limits following a trading suspension as a more effective means of enhancing liquidity and restoring market equilibrium.<sup>23</sup> One commenter noted that the resetting of circuit breakers meant that they would be triggered only in severe market declines and argued that the liquidity provided by issuer repurchases should benefit the market in instances of less extreme volatility.<sup>24</sup> This commenter, therefore, recommended that the volume limit be scaled in a manner that would allow increases in issuer repurchases to occur in tandem with market-wide price declines short of current circuit breaker levels, such as a 350 point decline in the DJIA.

The Commission has considered these comments. As discussed above, in proposing the amendment to Rule 10b-18, the Commission considered the significant benefits of providing clear guidance to issuers about the scope of permissible market activity following a market-wide trading halt and of facilitating liquidity when sell-order imbalances disrupt the orderly operation of the financial markets. The triggering of a circuit breaker is an extraordinary event and reflects an abnormal market condition. The circuit breaker levels indicate a market judgment that ordinary market mechanisms can operate adequately under less severe market conditions. Further, given that circuit breakers should rarely be triggered, the expansion of the safe harbor's timing condition is limited. At this time, the Commission considers the Rule 10b-18 volume condition, including the block exception, appropriate limits that should continue to apply in the trading session following a market-wide trading suspension and believes the expanded timing condition as adopted today will effectively enhance liquidity.<sup>25</sup>

After considering the comments, the Commission is adopting today the amendment to Rule 10b-18 substantially as proposed. In particular, the safe harbor now is available to an issuer that bids for or purchases its

governing market-wide trading halts on the NYSE, American Stock Exchange, Boston Stock Exchange, Chicago Stock Exchange, NASD, and Philadelphia Stock Exchange).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* NYSE Rule 80B (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 NASD 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.

<sup>18</sup> See Petition, *supra* note 1.

<sup>19</sup> For example, Rule 10b-18's safe harbor is not available during the Regulation M restriction period and during mergers, acquisitions and tender offers. 17 CFR 240.10b-18(a)(3).

<sup>20</sup> See Proposing Release, *supra* note 2. See also, Clifford P. Stephens and Michael S. Weisbach, "Actual Share Repurchases in Open-Market Repurchase Programs," *Journal of Finance*, February 1998 (observing that firms increase their repurchasing depending on the degree of perceived undervaluation of its stock and on expected cash flow).

<sup>21</sup> Letters from Morgan Stanley and BellSouth.

<sup>22</sup> See Memo from Larry Bergmann To Public Files (S7-27-98), dated November 10, 1998, regarding, among other matters, the Rule 10b-18 timing condition.

<sup>23</sup> Letters from AGI, Morgan Stanley, Intel, and NASD.

<sup>24</sup> Letter from the NASD.

<sup>25</sup> See discussion of Rule 10b-18 volume limitation, *supra* Part II. The Commission will reconsider the commenters' recommendations about the volume condition, as well as the manner, timing and price conditions in a forthcoming broad review of Rule 10b-18.

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.<sup>26</sup> As adopted, the safe harbor would also be available in the trading session following a market-wide trading suspension declared pursuant to a Commission emergency order.<sup>27</sup> The 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.

#### V. Costs and Benefits of the Adopted Amendment

To assist the Commission in evaluating the costs and benefits that may result from the proposal to amend Rule 10b-18, the Commission sought comment on the costs for any necessary modifications to information gathering, management, and recordkeeping systems or procedures, as well as any potential benefits resulting from the proposals to issuers, investors, broker-dealers and others. The Commission also requested that commenters provide, if possible, analysis and data to support their views. The Commission initially identified certain costs and benefits relating to the proposals and encouraged commenters to discuss any additional costs or benefits. The Commission received letters from seven commenters concerning the proposed amendment, however, none of the commenters responded specifically to the request for comment on the cost/benefit analysis. After considering the comments and the costs and benefits, the Commission continues to believe that the amendment to Rule 10b-18 should be adopted. Since the Commission is adopting the amendment as proposed, it is not making any changes that would increase the cost estimates for compliance with the Rule.

##### A. Benefits

The Commission's amendment to Rule 10b-18 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 continue to believe that the specific benefits set

forth below would flow from the adopted amendment.

The Commission believes that the amendment will facilitate trading in the issuer's securities by reducing issuer reluctance to purchase in response to sell-order imbalances that may occur during periods of severe market declines. By extending the safe harbor, the adopted amendment may encourage issuers to purchase their securities at a time when other market participants may be unable or unwilling to do so. We therefore believe that extending the safe harbor to issuers during the trading session following a market-wide trading suspension will improve the liquidity of markets in the issuer's securities. The safe harbor, as amended, also provides clarity as to the scope of permissible market activity for issuers and the broker-dealers that assist issuers in their stock repurchases.

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

##### B. Costs

By extending the safe harbor in the trading session following a market-wide trading suspension, the adopted amendment may encourage issuers to purchase their securities at a time when other market participants may be unable or unwilling to do so. Issuers would have to comply with all the Rule 10b-18 conditions, including the price provision which limits issuer bids and purchases to the higher of the current independent bid or last independent transaction price. Nonetheless, issuer bids for its security would compete against the bids of other buyers in the market following a market-wide trading suspension. Also, issuer bids may retard a further decline in the price of the issuer's stock.

The adopted amendment to Rule 10b-18 would not increase or decrease the current reporting burdens by imposing any new reporting, recordkeeping, or other compliance requirements. In the Proposing Release, the Commission noted that the Rule does implicitly require 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. Under the adopted amendment to Rule 10b-18, issuers

would continue to collect and keep such records should they make Rule 10b-18 purchases during the trading session following a market-wide trading suspension. The Commission also notes that any costs related to complying with Rule 10b-18, and the adopted amendment, are assumed voluntarily because the Rule provides an optional rather than mandatory safe harbor that issuers may use for purchasing their securities.

#### 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.<sup>28</sup> In the Proposing Release, the Commission solicited comment on the proposal's effect on competition, efficiency and capital formation. The Commission received no comments specifically regarding these issues. All commenters, however, did support the proposal's revision of the timing condition as facilitating short-term liquidity and providing issuers flexibility during periods of severe market downturns.

The Commission has considered the amendment in light of the standards cited in Section 23(a)(2) of the Act and believes they would not likely impose any significant burden on competition not necessary or appropriate in furtherance of the Exchange Act. As discussed above in the Cost-Benefit Section, the Commission recognizes that issuers bear a cost in order to demonstrate compliance with the Rule, but issuers assume this burden voluntarily. Nonetheless, the Commission continues to believe that the safe harbor, as amended, should improve market efficiency by providing additional purchasers, namely issuers, during a time of sell-order imbalance. This effect likely would enhance market liquidity following a market-wide trading suspension.

The proposed amendment to Rule 10b-18 would not have any anticompetitive effect because it would apply equally to all issuers and the safe

<sup>26</sup> See discussion of proposal and accompanying footnotes, *supra* Part I.

<sup>27</sup> See discussion, *supra* note 4.

<sup>28</sup> 15 U.S.C. 78c(f).

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.

## VII. Final Regulatory Flexibility Analysis

The Commission has prepared a Final Regulatory Flexibility Analysis (FRFA) concerning the adopted amendment to Rule 10b-18 in accordance with Section 4 of the Regulatory Flexibility Act (RFA).<sup>29</sup>

### A. Need for and Objectives of the Rule 10b-18 Amendment

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.<sup>30</sup> 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 proposal adjusted the Rule's time of purchase condition but provided 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.

The amendment to Rule 10b-18, as adopted, will allow issuers who otherwise comply with the current Rule 10b-18 safe harbor conditions governing manner, price and volume to use the amended 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 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 Rule 10b-18 amendment, by modifying the safe harbor's timing condition during the trading session following a market break, likely will improve liquidity and facilitate market participants' ability to reestablish

equilibrium between buying and selling interests.

### B. Significant Issues Raised by Public Comment

In response to the Proposing Release, the Commission received letters from seven commenters. All commenters supported the proposal's revision of the timing condition as facilitating short-term liquidity and providing issuers flexibility during periods of severe market downturns. Several commenters noted that since market declines are beyond the control of individual issuers, the proposal, applicable only in the trading session following a market-wide trading suspension, did not raise the same manipulation concerns traditionally underlying the safe harbor conditions.<sup>31</sup> Many commenters observed that the presence of issuers provides an important source of liquidity, or buy-side interest, during volatile markets when investors may wish to liquidate their securities holdings. Several commenters observed that the proposal would also assist specialists and market makers in eliminating sell-order imbalances and reestablishing market equilibrium.<sup>32</sup> Commenters stated that Rule 10b-18's silence as to the scope of permissible issuer activity during volatile markets in practice prevents issuers from buying back their shares during severe market declines.<sup>33</sup>

Four commenters recommended raising the volume limits following a trading suspension as a more effective means of enhancing liquidity and restoring market equilibrium.<sup>34</sup> One commenter noted that the resetting of circuit breakers meant that they would be triggered only in severe market declines and suggested that the liquidity provided by issuer repurchases should benefit the market in instances of less extreme volatility.<sup>35</sup> This commenter, therefore, recommended that the volume limit be scaled in a manner that would allow increases in issuer repurchases to occur in tandem with market-wide price declines short of current circuit breaker levels, such as a 350 point decline in the DJIA.

### C. Small Entities Subject to the Rule

The adopted amendment may affect those small entity issuers and affiliated

purchasers that wish to avail themselves of the safe harbor provisions in the trading session following a market-wide trading suspension. Based on Exchange Act Rule 0-10(a), a small issuer is one that has total assets of \$5,000,000 or less on the last day of its most recent fiscal year. Based on information about issuer repurchase programs conducted in 1997, the Commission estimates that approximately 1,455 issuers could avail themselves of the safe harbor each year, of which about 10 may be considered small entities.

In the IRFA, the Commission's staff estimated that 10 issuers that are small entities may avail themselves of the safe harbor per year.<sup>36</sup> The Commission sought comment on the number of issuers engaged in market repurchases of their stock and the number of such issuers that are small entities. No commenters responded to these estimates.

### D. Projected Reporting, Recordkeeping and Other Compliance Requirements

The adopted amendment to Rule 10b-18 would not impose any new reporting, recordkeeping, or other compliance requirements.

### E. Agency Action To Minimize the Effect on Small Entities

Section 4(a) of the RFA<sup>37</sup> 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. Pursuant to Section 3(a) of the RFA,<sup>38</sup> the Commission considered the following alternatives in connection with the adopted amendment:

- (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 adopted amendment, the Commission believes that the establishment of different requirements for small entities is neither necessary nor practicable, because the amendment provides a voluntary safe harbor from liability for manipulation

<sup>31</sup> Letter from Intel and the NASD.

<sup>32</sup> Letters from Morgan Stanley and BellSouth.

<sup>33</sup> See Memo from Larry Bergmann To Public Files (S7-27-98), dated November 10, 1998, regarding, among other matters, the Rule 10b-18 timing condition.

<sup>34</sup> Letters from AIG, Morgan Stanley, Intel, and the NASD.

<sup>35</sup> Letter from the NASD.

<sup>36</sup> Proposing Release, *supra* note 2, Part VII. This estimate was based on information about issuer repurchase programs conducted in 1997.

<sup>37</sup> 5 U.S.C. 604(a).

<sup>38</sup> 5 U.S.C. 603(a).

<sup>29</sup> 5 U.S.C. 604.

<sup>30</sup> See Petition, *supra* note 1.

under the Exchange Act. The amendment to Rule 10b-18, as adopted, 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.

### VIII. Paperwork Reduction Act

Certain provisions of the amendment to Rule 10b-18 contain "collection of information" requirements within the meaning of the Paperwork Reduction Act of 1995 (PRA);<sup>39</sup> 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. An agency may not sponsor, conduct, or require a response to an information collection unless a currently valid OMB control number is displayed. In the Proposing Release, the Commission solicited comment on its evaluation of the proposal's estimated burden. The Commission received no comments specifically addressing these issues.

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 amendment to the Rule's timing condition expands the safe harbor's availability during the trading session following a market-wide trading suspension.

The adopted amendment to Rule 10b-18 would not increase or decrease the current reporting burdens by imposing any new reporting, recordkeeping, or other compliance requirements. In the Proposing Release, the Commission noted that the Rule does implicitly require 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. Under the adopted amendment to Rule 10b-18, issuers would continue to collect and keep such records should they make Rule 10b-18 purchases during the trading session following a market-wide trading

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

### IX. Statutory Basis and Text of Adopted Amendment

The rule amendment is being adopted 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 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.* 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:

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

(2) 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 paragraphs (b) or (c) of this section.

By the Commission.

Dated: September 23, 1999.

**Margaret H. McFarland,**

*Deputy Secretary.*

[FR Doc. 99-25252 Filed 9-28-99; 8:45 am]

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## DEPARTMENT OF TRANSPORTATION

### Coast Guard

#### 33 CFR Part 165

[COTP New Orleans, LA Regulation 99-022]

RIN 2115-AA97

#### Safety Zone Regulations; Mile 94.0 to Mile 96.0, Lower Mississippi River, Above Head of Passes

**AGENCY:** Coast Guard, DOT.

**ACTION:** Temporary final rule.

**SUMMARY:** The Coast Guard is establishing a temporary safety zone from mile 94.0 to mile 96.0, Lower Mississippi River, Above Head of Passes, extending the entire width of the river. The safety zone has been established to protect personnel involved in pollution response and underwater diving operations within the channel. Entry into this zone while divers are deployed is prohibited to all vessels, with the exception of towing vessels operating without tows, unless authorized by the Captain of the Port. Entry into this zone while divers are not deployed will be managed by the Coast Guard Traffic Light Operator at Governor Nicholls Traffic Light, VHF-FM Channel-67. The Governor Nicholls and Gretna Traffic Lights will be in operation until the safety zone expires. Authorization to enter the safety zone while divers are deployed will only be granted during emergency situations which affect the safety of vessels or the safety of the port.

**EFFECTIVE DATES:** This temporary final rule is effective from 6:00 p.m. (CDT)

<sup>39</sup> 44 U.S.C. 3501 *et seq.*