

The background of the slide is a dark green with various financial market data. It includes candlestick charts, line graphs, and bar charts. Currency codes such as ITL, DEM, BEF, FRF, MLG, RUS, JPY, EUR, CHF, GBR, SEK, CAD, RMY, and DTR are visible, along with their respective values and percentage changes. A large, stylized green arrow points from the top left towards the bottom right, passing behind the main title.

Morgan Lewis

GLOBAL PUBLIC COMPANY ACADEMY

SHARE BUYBACK PROGRAMS AND CONSIDERATIONS RELATING TO ALTERNATIVE PROGRAMS

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SHARE REPURCHASES - BASICS

Rule 10b-18:

- Provides an issuer (and its affiliated purchasers) with a “safe harbor” from liability for manipulation under Section 9(a)(2) of the Exchange Act and Rule 10b-5 under the Exchange Act solely by reason of the manner, timing, price, and volume of their repurchases when they repurchase the issuer’s common stock in the market in accordance with Rule 10b-18’s manner, timing, price, and volume conditions.
- To meet the safe harbor, an issuer’s repurchases must satisfy (on a daily basis) each of Rule 10b-18’s four conditions.
- Rule 10b-18 is not available for repurchases that, although made in technical compliance with the section, are part of a plan or scheme to evade the federal securities laws.

Rule 10b-18 has four requirements.

Rule 10b-18 First Requirement – One Broker or Dealer.

Rule 10b-18 requires that Rule 10b-18 purchases must be effected from or through only one broker or dealer on any single day; provided, however, that:

- The “one broker or dealer” condition shall not apply to Rule 10b-18 purchases that are not solicited by or on behalf of the issuer or its affiliated purchaser(s);
- Where Rule 10b-18 purchases are effected by or on behalf of more than one affiliated purchaser of the issuer (or the issuer and one or more of its affiliated purchasers) on a single day, the issuer and all affiliated purchasers must use the same broker or dealer; and
- Where Rule 10b-18 purchases are effected on behalf of the issuer by a broker-dealer that is not an electronic communication network (ECN) or other alternative trading system (ATS), that broker-dealer can access ECN or other ATS liquidity in order to execute repurchases on behalf of the issuer (or any affiliated purchaser of the issuer) on that day.

Rule 10b-18 Second Requirement – Time of Purchases.

Rule 10b-18 purchases must not be:

- the opening (regular way) purchase reported in the consolidated system;
- 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 average daily trading volume 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.

In addition, there are special rules that address Rule 10b-18 purchases following the close of the primary trading session.

Rule 10b-18 Third Requirement – Price of Purchases.

Rule 10b-18 purchases must be effected 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;
- for securities for which bids and transaction prices are not quoted or reported in the consolidated system, Rule 10b-18 purchases must be effected at a purchase price that does not exceed the highest independent bid or the last independent transaction price, whichever is higher, displayed and disseminated on any national securities exchange or on any inter-dealer quotation system that displays at least two priced quotations for the security, at the time the Rule 10b-18 purchase is effected; and
- for all other securities, Rule 10b-18 purchases must be effected at a price no higher than the highest independent bid obtained from three independent dealers.

Rule 10b-18 Fourth Requirement – Volume of Purchases.

The total volume of Rule 10b-18 purchases effected by or for the issuer and any affiliated purchasers effected on any single day must not exceed 25 percent of the average daily trading volume for that security.

However, once each week, in lieu of purchasing under the 25 percent of average daily trading volume limit for that day, the issuer or an affiliated purchaser of the issuer may effect one block purchase if:

- no other Rule 10b-18 purchases are effected that day, and
- the block purchase is not included when calculating a security's four week average daily trading volume under this section.

Section 10(b) of the Exchange Act and Rule 10b-5 thereunder.

Section 10(b) and Rule 10b-5 prohibit, among other things:

- the purchase or sale of a security of any issuer, on the basis of material nonpublic information about that security or issuer, in breach of a duty of trust or confidence that is owed directly, indirectly, or derivatively, to the issuer of that security or the shareholders of that issuer, or to any other person who is the source of the material nonpublic information.

Compliance with Rule 10b-18 does not provide any protection from possible Section 10(b) and Rule 10b-5 liability where the issuer engages in the repurchases while in possession of material, non-public information concerning its securities.

Rule 10b5-1 under the Exchange Act.

- Rule 10b5-1 provides an affirmative defense to claims that purchases or sales of securities are made on the basis of material nonpublic information if the requirements of the rule are satisfied.
- Rule 10b5-1 is available only when the contract, instruction, or plan to purchase or sell securities was given or entered into in good faith and not as part of a plan or scheme to evade the prohibitions of Section 10(b) and Rule 10b-5.

Rule 10b5-1 has three requirements.

Rule 10b5-1 – First Requirement.

The first requirement of Rule 10b5-1 is that a person, before becoming aware of material nonpublic information:

- entered into a binding contract to purchase or sell the security,
- instructed another person to purchase or sell the security for the instructing person's account, or
- adopted a written plan for trading securities.

Rule 10b5-1 – Second Requirement.

The second requirement of Rule 10b5-1 provides that the contract, instruction or plan described in the first requirement:

- specified the amount of securities to be purchased or sold and the price at which and the date on which the securities were to be purchased or sold;
- included a written formula or algorithm, or computer program, for determining the amount of securities to be purchased or sold and the price at which and the date on which the securities were to be purchased or sold; or
- did not permit the person to exercise any subsequent influence over how, when, or whether to effect purchases or sales; provided, in addition, that any other person who, pursuant to the contract, instruction, or plan, did exercise such influence must not have been aware of the material nonpublic information when doing so.

Rule 10b5-1 – Third Requirement.

The third requirement of Rule 10b5-1 is that:

- the purchase or sale that occurred was pursuant to the contract, instruction, or plan.

A purchase or sale is not “pursuant to a contract, instruction, or plan” if, among other things, the person who entered into the contract, instruction, or plan altered or deviated from the contract, instruction, or plan to purchase or sell securities (whether by changing the amount, price, or timing of the purchase or sale), or entered into or altered a corresponding or hedging transaction or position with respect to those securities.

Announcement of Repurchase Plan.

Press Release

Companies typically announce open market repurchase plans in a press release.

Form 8-K

Companies typically also file the repurchase plan press release under Item 8.01 of Form 8-K, including the press release as an exhibit.

Ongoing Exchange Act Reporting of Repurchase Programs.

Under Item 703 of Regulation S-K, registrants must disclose on a quarterly basis:

- all repurchases made during each month of the quarter covered in tabular format, including shares purchased pursuant to Rule 10b-18 or otherwise, setting forth:
 - (1) the total number of shares purchased;
 - (2) the average price paid per share;
 - (3) the total number of shares purchased as part of publicly announced repurchase plans or programs; and
 - (4) the maximum number (or approximate dollar value) of shares that may yet be purchased under the plans or programs.
- in a footnote to the repurchase table,
 - (1) the date each plan or program was announced;
 - (2) the dollar amount (or share amount) approved;
 - (3) the expiration date (if any) of each plan or program;
 - (4) each plan or program that has expired during the period covered by the table; and
 - (5) each plan or program the issuer has decide to terminate.

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SHARE REPURCHASES - DERIVATIVES

Types of Derivative Products

- Accelerated Share Repurchase/Accelerated Share Buyback (ASR/ASB)
- Purchase of Call option
- Sale of Put option
- Sub-VWAP trades

ASR/ASB

Can be used to rapidly retire a large number of shares

- Structure
 - Fixed share or fixed price
 - Sub-VWAP pricing available
- Considerations
 - MNPI
 - Cap or collaring exposure
- Accounting treatment
 - Can be structured to receive equity accounting treatment
- Disclosure
 - Announced program
 - Press release and 8-K
 - 10K/10Q

Purchase of Call Option

Can be used if share price is expected to rise

- Structure
 - Strike price vs. zero price
- Considerations
 - MNPI
 - Cost of option
- Accounting treatment
 - Equity accounting possible
- Disclosure
 - Announced program
 - 10K/10Q

Sale of Put Option

Can be used if share price is expected to fall

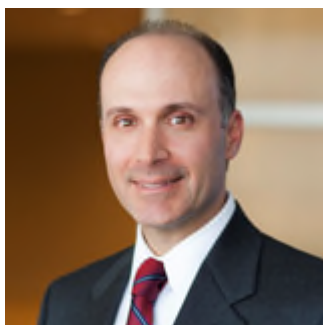
- Structure
- Considerations
 - MNPI
 - Rolling
- Accounting treatment
 - Marked to market
- Disclosure
 - Announced program
 - 10K/10Q

Sub-VWAP Trade

Can be used to purchase shares at a discount to VWAP

- Structure
- Considerations
 - 10b-18
 - Optionality
- Disclosure
 - Announced program
 - 10K/10Q

Biographies



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Thomas P. Giblin, Jr., advises clients on securities law matters, with a particular focus on representing utility and energy clients in capital markets transactions. Tom's practice includes representing clients in registered offerings of debt and equity securities, Rule 144A and Regulation S transactions, and private placements. Tom also advises public companies on Securities Exchange Act of 1934 disclosure obligations and assists clients with compliance with the Sarbanes-Oxley Act of 2002 and other corporate governance requirements.

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