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STRUCTURING SHARE REPURCHASES: RULE 10b-18 AND RULE 10b5-1 APPLIED TO VARIOUS OPEN-MARKET REPURCHASE PROGRAMS

Share repurchase programs are a tool used by many public companies to return capital to shareholders. This article examines how Rule 10b-18 and Rule 10b5-1 of the Securities Exchange Act of 1934 operate. It then discusses how OMR, ASR, and eOMR transactions work. Lastly, it analyzes the extent to which Rule 10b-18 and Rule 10b5-1 may apply to each of these types of transactions.

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Share repurchase (or share buyback) programs are a tool used by many public companies to return capital to shareholders. Once a public company has resolved to initiate share repurchases, the focus turns toward structuring the share repurchase program. There are many types of transactions available to execute share repurchases. Transaction structures range from relatively simple open-market share repurchases (“OMR”) to more complex accelerated share repurchase transactions (“ASR”), with enhanced open-market share repurchases (“eOMR”) serving as a hybrid in between. From a legal perspective, it is important to determine whether the desired share repurchase transaction may take advantage of the legal protections offered by the Rule 10b-18 safe harbor and Rule 10b5-1.

To build a framework to understand share repurchase alternatives, first let’s examine how Rule 10b-18 and Rule 10b5-1 operate. Next, let’s examine how OMR, ASR and eOMR transactions work and highlight certain notable features of these transactions. Then, let’s analyze

the extent to which Rule 10b-18 and Rule 10b5-1 may apply to each of these types of transactions.

COMMERCIAL FEATURES THAT DISTINGUISH SHARE REPURCHASE TRANSACTIONS

When a public company evaluates various share repurchase alternatives, some helpful things to consider are:

- The level of control over the daily spend of the share repurchase activity;
- The ability to terminate the share repurchase activity;
- The ability to receive a large upfront delivery of shares;
- Whether to use a derivative transaction to effect share repurchase activity; and

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