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SEC Updates Guidance on Lock-Up Agreements and Cash Tender Offers

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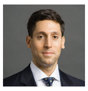

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The Securities and Exchange Commission (SEC) has recently updated Compliance and Disclosure Interpretations (C&DIs) regarding lock-up agreements and tender offers, offering notable clarifications for corporations considering these transactions.

Lock-Up Agreements: The SEC has clarified the rules around obtaining voting commitments or written consents from target company insiders in public M&A transactions. Commonly, acquirors seek voting commitments in support of a transaction from target company insiders, before the transaction is announced and/or a proxy statement is filed. In the context of a stock-for-stock merger, it has not previously been clear whether these voting commitments constituted investment decisions under the Securities Act of 1933 (Securities Act), thereby impacting the ability of the acquiror to register the offer and sale of its securities to be issued as part of the transaction. Under the revised C&DI, acquirors can now register the stock issuable to other target shareholders, on an S-4 or F-4, even when insiders have signed lock-up agreements. More specifically, the SEC will not object to the registration of the acquiror's shares as long as the following conditions are met:

- The lock-ups involve only target company insiders (executive officers, directors, affiliates, founders, 5% holders, etc.).
- Less than 100% of the target company's voting equity is controlled by those insiders.
- Votes are solicited from target shareholders who have not signed lock-ups if needed for approval under applicable law.
- The acquiror delivers a prospectus to all target company shareholders entitled to vote.

This update allows the registration of shares on Form S-4/F-4 to all security holders of the target company who did not already consent to the transaction, provided all insiders that did will acquire securities pursuant to a valid Securities Act exemption.

All-Cash Tender Offers: The SEC has also issued five new C&DIs on cash tender offers, clarifying various scenarios under Regulation 14D:

- **Duration of Offer Following Material Change (CDI 101.17):** All-cash tender offers must generally remain open for at least five business days after disclosing a material change. However, a shorter period may be acceptable if security holders have enough time to consider the new information.
- **Securing Committed Financing After Launch (CDI 101.18):** If the offeror secures committed financing after launching a tender offer that was previously unfinanced, it constitutes a material change, requiring prompt disclosure and an amendment to Schedule TO.

- **Fully Financed Offers (CDI 101.19):** A "highly confident" letter is not sufficient to consider a tender offer fully financed. However, an offer will be considered fully financed if accompanied by a binding commitment from a lender to provide the funds necessary.
- **Substitution of Funding Source (CDI 101.20):** Where an offeror in a fully financed cash tender offer decides to use an alternative funding source or available cash, this substitution is not considered a material change. The offeror should still consider updating the tender offer materials to reflect the substitution of the funding source and any new material terms.
- **Funding or Default Under Binding Commitment Letters (CDI 101.21):** If a lender either defaults or the offeror otherwise conditions the tender on receipt of financing which otherwise does not come through but the offeror waives the funding condition because it is able to access alternative funds, no material change will be deemed to have occurred requiring amendment to the Schedule TO. However, if the offeror waives the funding condition without an alternative funding source, this is a material change and must be disclosed promptly, along with an amended filing and prompt disclosure. The offeror should also consider whether the lack of funding could implicate other tender offer provisions, such as the prompt payment requirement.

The SEC’s updated guidance for M&A lock-up agreements and cash tender offers provides increased certainty for companies involved in these transactions, particularly by clarifying when changes require disclosure and how to handle financing and funding issues in tender offers.