

SEC STAFF ISSUES NEW GUIDANCE ON M&A LOCKUPS AND ALL-CASH TENDER OFFERS

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WHAT HAPPENED

The SEC staff recently published new guidance for voting commitments in public M&A transactions and all-cash tender offers. The guidance:

- Relaxes the ability of acquirors, after obtaining written consents from target company insiders, to register stock issuable to the other target shareholders in S-4 transactions.
- Clarifies the application of cash tender offer rules relating to:
 - The required duration of an offer following disclosure of a material change.
 - When securing committed financing after launch may constitute a material change.
 - When an offer is deemed fully financed.
 - When substitution of an offeror's funding source does not constitute a material change.
 - When funding or default under binding commitment letters may constitute a material change.

TAKEAWAYS

The new guidance for M&A lockup agreements and cash tender offers will provide greater certainty for parties to transactions that follow the specified fact patterns.

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HOW TO PRESERVE S-4 REGISTRATION WHEN SEEKING LOCKUPS FROM TARGET COMPANY INSIDERS

The SEC staff has clarified the ability of acquirors to obtain voting commitments or written consents from insiders in public M&A transactions, i.e., those covered by Securities Act Rule 145(a). In its view, “[t]he execution of a lock-up agreement may constitute an investment decision under the Securities Act.”

In [Revised CDI 239.13](#) (repeated in [Revised CDI 225.10](#)), where target company insiders sign commitments (or lockup agreements) to vote in favor of the transaction before presentation to non-affiliated shareholders, the staff will not object to registration of offers and sales of the acquiror’s shares so long as:

- The lockups involve only executive officers, directors, affiliates, founders and their family members, and holders of 5% or more of the voting equity securities (target company insiders).
- The parties to the lockups hold less than 100% of the voting equity of the target company.
- Votes will be solicited from target shareholders who have not signed lockups if such votes are needed for approval under applicable law.
- The acquiror delivers a prospectus to all shareholders of the target company entitled to vote.

The principal changes effected in the new guidance (reflected in the [accompanying redline](#)) include:

- In the 3rd bullet, that solicitation of votes is required if needed for approval under applicable law.
- Adding the 4th bullet requiring prospectus delivery.

Additionally, the revisions modify the previous prohibition on registering the offer and sale of shares for any shareholders where target company insiders have delivered written consents in the above circumstances before the Form S-4/F-4 is filed. In the staff’s previous view, “once begun privately, the transaction must end privately.” Instead, now the staff will not object to the subsequent registration on the Form S-4/F-4 where:

- Target company insiders who delivered written consents will only receive shares in a valid exempt offering (typically a Section 4(a)(2) private placement).
- The shares registered on the Form S-4/F-4 are offered and sold only to shareholders who did not deliver written consents.

NEW GUIDANCE FOR ALL-CASH TENDER OFFERS

- ***Duration of Offer Following Material Change.*** All-cash tender offers need not always remain open at least five business days after disclosure of a material change – although that remains

the “general rule.” A shorter period may be adequate if disclosure and dissemination of the material change allows holders sufficient time to consider such information and factor it into their decision. [New CDI 101.17](#).

- ***Securing Committed Financing After Launch Deemed Material Change.*** Securing committed financing after launching an all-cash tender offer without sufficient funds or committed financing would constitute a material change. The offeror must:
 - Promptly disclose the change from an unfinanced tender offer to a fully financed tender offer.
 - Promptly file an amendment to Schedule TO to report the material change.
 - Promptly disseminate disclosure in a manner reasonably designed to inform security holders of the change – with sufficient time for them to consider such information and factor it into their decision. Depending on proximity to the end of the tender period, the offer may need to be extended. [New CDI 101.18](#)

- ***When an Offer is Deemed Fully Financed.*** A tender offer is considered fully financed if the offeror has obtained a binding commitment letter from a lender. A "highly confident" letter from a lender, however, is not viewed as the equivalent of a binding commitment letter. [New CDI 101.19](#).

- ***When Substitution of Funding Source is Not Deemed Material Change.*** Where the offeror disclosed potential alternative funding sources to the lender under a binding commitment letter, the utilization of such an alternative funding source (such as using available cash or committed financing from a different lender) is not considered a material change. The offeror should consider whether the tender offer materials should be updated to reflect the substitution of the funding source (or the substitution of cash) and the material terms of the new funding source. [New CDI 101.20](#).

- ***Scenarios With Binding Commitment Letter Potentially Resulting in Material Change.*** When the offeror has a binding commitment letter from a lender and the tender offer is conditioned upon actual receipt of funds:
 - If it receives the expected funds, no material change in the information given to security holders has occurred. The lender has simply fulfilled its contractual obligation.
 - If the lender defaults but the offeror waives the funding condition while accessing an alternative source of funds that had been disclosed, then no material change has occurred.

- If the lender defaults but the offeror waives the funding condition without having disclosed an alternative funding source, then the waiver would constitute a material change, requiring the offeror to:
 - Promptly disclose the material change.
 - Promptly file an amendment to Schedule TO to report the material change.
 - Promptly disseminate disclosure in a manner reasonably designed to inform security holders of the change.
 - Consider other tender offer provisions, such as the prompt payment requirement in Rule 14e-1(c) as well as Section 14(e). [New CDI 101.21](#).

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MEET THE TEAM



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