28 April 2014

Association of British Insurers Releases New Best Practice Guidelines for Lock-Up Periods

The Association of British Insurers' guidelines recommend greater transparency in disclosures relating to lock-up agreements.

On 14 April, the Association of British Insurers (ABI) published best practice recommendations[1] for its members about their approach to lock-up agreements. The statement follows concerns in the market regarding lock-ups being frequently waived by investment banks before the stated expiry date.

Background

In an initial public offering (IPO), it is common practice for underwriters and the company's directors, officers, and certain significant shareholders to enter into a lock-up agreement to provide that there will be no further sales of shares by such persons for a certain period. The lock-up agreement plays a significant market function both in regulating the supply of shares in the company and in reassuring investors at the time of the IPO that key insiders are tied in to the company for a period of time post-IPO. The lock-up agreements are, therefore, relevant to price formation, and, as such, investors place significant reliance on them. The ABI has noted (reflecting comments from other market observers) that there appears to be an increasing trend for investment banks to waive the lock-ups, in some cases a significant period of time before the stated expiry date. The ABI has acknowledged the arguments of vendors and investment banks that there is merit in retaining a degree of flexibility in the ability to waive a lock-up (in particular, to seek to avoid potentially dangerous overhangs that distort the market in the run-up to a lock-up period's expiry). However, the ABI has noted that such a practice may be potentially misleading to the market.

ABI Recommendations

Against this background, the ABI has recommended the following approach, discerning between a "soft" lock-up, which can be broken or waived at the sole discretion of the investment bank, and a "hard" lock-up, where no sales can take place at all or where sales can take place only in very limited and defined circumstances:

- The lock-up period and the circumstances under which any sale may occur prior to its expiry must be clearly disclosed (in particular, whether any part of the lock-up is a soft lock-up).
- Soft lock-ups are only appropriate for relatively short periods.
- Where a longer duration of lock-up is used, it is appropriate for the lock-up to specify an initial period of hard lock-up.
- Where a lock-up may be waived by an investment bank, the investment bank must give careful consideration and take account of the overall merits of such a waiver from investors' perspectives and of the need to maintain market integrity. Consequently, investors should be able to expect that any waiver will only be granted close to the lock-up expiry date.

1. View the recommendations at https://www.abi.org.uk/~/media/Files/Documents/Publications/Public/2014/investment/ABI%20Position%20on%20Lock%20Up%20Agreement%20April%202014.ashx.

Morgan Lewis

Implications

Whilst the ABI recommendations have no legal enforceability, they do influence market practice because of the buying power of ABI members. In addition, given the UK market's tendency to adopt market guidance issued by the ABI in other areas as best practice (for example, disapplication of statutory pre-emption rights on new issues of shares), it is expected that there may be some changes in market practice to seek to address the ABI's concerns.

Contacts

If you have any questions or would like more information on the issues discussed in this LawFlash, please contact any of the following Morgan Lewis lawyers:

London

Iain Wright	+44 (0) 20 3201 5630	iwright@morganlewis.com
Thomas J. Cartwright	+44 (0) 20 3201 5671	tcartwright@morganlewis.com
Amy B. Comer	+44 (0) 20 3201 5535	acomer@morganlewis.com
Stephen Walters	+44 (0) 20 3201 5610	swalters@morganlewis.com

About Morgan, Lewis & Bockius

Founded in 1873, Morgan Lewis offers more than 1,600 legal professionals—including lawyers, patent agents, benefits advisers, regulatory scientists, and other specialists—in 25 offices across the United States, Europe, Asia, and the Middle East. The firm provides comprehensive litigation, corporate, transactional, regulatory, intellectual property, and labour and employment legal services to clients of all sizes—from globally established industry leaders to just-conceived start-ups. For more information about Morgan Lewis or its practices, please visit us online at www.morganlewis.com.