

Question 139.29

Question: ~~May~~Can an issuer contemplating a registered ~~debt~~-exchange offer execute a lock-up agreement (or agreement to tender) with a ~~note~~security holder before the filing of the Form S-4 (or Form F-4) registration statement?

Answer: The execution of a lock-up agreement (or agreement to tender) may constitute a contract of sale under the Securities Act. If so, the offer and sale of the issuer's securities would be made to ~~note~~security holders who entered into such an agreement before the exchange offer is made to other ~~note~~security holders.

Recognizing the legitimate business reasons for seeking lock-up agreements (or agreements to tender) in this type of transaction, the staff will not object to the registration of offers and sales on Form S-4 (or Form F-4) when lock-up agreements (or agreements to tender) have been ~~signed~~executed in the following circumstances:

- the lock-up agreements (or agreements to tender) are ~~signed~~executed only by accredited investors or qualified institutional investors;
- the persons ~~signing~~executing the lock-up agreements (or agreements to tender) collectively own less than 100% of the ~~outstanding principal amount of the particular series of notes~~subject securities;
- ~~a tender~~the exchange offer will be made to all holders of the ~~particular series of notes~~subject securities; and
- all ~~note~~security holders eligible to participate in the exchange offer are offered the same amount and form of consideration.

When lock-up agreements (or agreements to tender) are executed before the filing of a registration statement and the ~~circumstances noted~~conditions listed above are not satisfied, the subsequent registration of the exchange offer on Form S-4 ~~may be inappropriate. An exchange offer is a single transaction, and a transaction that has commenced privately must be completed privately. Similarly, if a note holder actually tenders its notes—for example, by signing a transmittal form—before the filing of the Form S-4 (or Form F-4) is generally not permitted. Consistent with Question 239.13, however,~~ the staff ~~has objected~~will not object to the subsequent registration of ~~the exchange offer on Form S-4 for any of the note holders because~~ offers and sales ~~have already been made and completed privately. An~~of securities on Form S-4 (or Form F-4) if:

- the accredited investors or qualified institutional investors who executed the lock-up agreements (or agreements to tender) will be offered and sold securities only in an offering made pursuant to a valid Securities Act exemption; and
- the securities registered on the Form S-4 (or Form F-4) will be offered and sold only to those security holders who did not execute lock-up agreements (or agreements to tender).

Finally, an issuer seeking ~~to~~-lock-up ~~note~~agreements (or agreements to tender) from security holders must also consider whether such efforts represent the commencement of a tender offer. [~~Aug. 11, 2010~~January 23, 2026] [Comparison to prior version]