

Question 139.30

Question: In a negotiated third-party exchange offer, ~~may~~can an acquiring company execute a lock-up agreement (or agreement to tender) before the filing of the Form S-4 (or Form F-4) registration statement to obtain a commitment from management and principal security holders of a target company to tender their ~~shares~~securities in the exchange offer?

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 acquiror's securities would be made to persons who entered into such an agreement before the exchange offer is made to other target security holders.

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

- the lock-up agreements (or agreements to tender) involve only executive officers, directors, affiliates, founders and their family members, and holders of 5% or more of the subject securities of the target company (“target company insiders”);
- the persons ~~signing~~executing the lock-up agreements (or agreements to tender) collectively own less than 100% of the subject securities of the target company;
- ~~a tender~~the exchange offer will be made to all holders of the subject securities of the target company; and
- all holders of the subject securities of the target; ~~and~~
- ~~all holders of the subject securities of the target company~~ 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 ~~such agreements exceed the circumstances noted~~the 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 holder actually tenders its subject securities—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~~offers and sales of securities on Form S-4 ~~for any of the holders of the subject securities because offers and sales have already been made and completed privately. An~~(or Form F-4) if:

- the target company insiders 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 acquiring company seeking ~~to~~ lock ~~up~~ ~~holders of the subject securities~~agreements (or agreements to tender) from the target company insiders must also consider whether such efforts represent the commencement of a tender offer. [~~Aug. 11, 2010~~January 23, 2026]