



SEC Publishes Updated C&DIs on Lock-Up Agreements and Tender Offers

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On March 6, 2025, the Securities and Exchange Commission (SEC) released updated Compliance and Disclosure Interpretations (C&DIs) concerning lock-up agreements in the context of business combinations and introduced new C&DIs related to tender offers. These updates aim to provide clearer guidance on the regulatory requirements and implications for companies involved in these transactions.

C&DIS ON LOCK-UP AGREEMENTS

Securities Act C&DI Question 239.13 and Securities Act Forms C&DI Question 225.10, as revised (Lock-up C&DIs), clarify the conditions under which lock-up agreements are considered permissible in business combinations. The SEC's revised Lock-up C&DIs specify that the SEC staff will not object to the registration of offers and sales of securities involved in business combinations that are covered by Rule 145(a) under the Securities Act and that are the subject of signed lock-up agreements where:

- i. the lock-up agreements involve only target company insiders,
- ii. those executing the lock-up agreements collectively own less than 100% of the voting equity securities of the target company,
- iii. votes will be solicited from security holders of the target company who have not signed the agreements if such votes are needed to approve the business combination under applicable state or foreign law, and
- iv. the acquiring company delivers a prospectus to all security holders of the target company entitled to vote on the business combination.

The Lock-up C&DIs clarify that these lock-up agreements must be disclosed in the prospectus to ensure transparency for all voting security holders.

NEW C&DIS ON RULE 14E-5 AND TENDER OFFERS

The five new tender offer C&DIs (Questions 101.17–101.21) provide detailed guidance on certain procedural and disclosure requirements for tender offer transactions (Tender Offer C&DIs), Rule 14e-5 under the Securities

Exchange Act prohibits bidders in a tender offer from purchasing target securities outside of the offer once it is publicly announced.

- C&DI Question 101.17 clarifies that while the SEC generally requires an all-cash tender offer to remain open for at least five business days after a material change is disclosed, a shorter period may be sufficient if the disclosure provides security holders with enough time to consider the information and make informed decisions based on the facts and circumstances.
- C&DI Question 101.18 explains that securing committed financing necessary to fund the purchase of all securities sought in an all-cash tender offer constitutes a material change. Therefore, the offeror must promptly disclose the material change to a fully financed offer, file an amendment to Schedule TO, and disseminate the disclosure to security holders to ensure that they have sufficient time to consider the new information and make informed decisions.
- C&DI Question 101.19 clarifies that a “highly confident” letter from a lender is not sufficient to classify a tender offer as fully financed. However, a binding commitment letter from a lender does classify the tender offer as fully financed.
- C&DI Question 101.20 explains that a material change has not occurred if a funding source is substituted, or available cash is used to purchase securities. However, the tender offer materials should be updated to reflect the substitution of the funding source (or the use of cash) and the material terms of the new funding source.
- C&DI Question 101.21 clarifies that a material change determination based on a waiver or satisfaction of a funding condition depends on whether the offeror has an alternative funding source. Therefore, if the lender fulfills its contractual obligation, no material change occurs. But, if the lender does not fulfill its obligation and the offeror waives the funding condition without an alternative funding source, a material change has occurred, and it must be disclosed, filed, and disseminated to security holders.

Overall, the SEC’s Lock-up C&DIs and Tender Offer C&DIs reflect its ongoing commitment to providing clear and actionable guidance for companies navigating complex transactions. As these updates take effect, companies should stay informed and consult with legal experts to ensure compliance and optimize their transaction strategies.

Winston’s Capital Markets & Securities Law Watch will monitor developments related to the SEC’s C&DIs and will provide our readers with timely updates as new information becomes available.

For more information about the SEC’s updated C&DIs, or if you have any questions, please contact the authors of this blog post or your regular Winston contacts.

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