New SEC Guidance for M&A Sign-and-Consent Structures and Tender Offers

March 13, 2025

On March 6, 2025, the staff of the Division of Corporation Finance of the Securities and Exchange Commission (the "SEC") issued two updated Compliance and Disclosure Interpretations ("C&DIs") relating to the use of "lock-up" agreements and written consents in certain business combination transactions, which reverses its previous guidance on the topic. In addition, the SEC issued five new C&DIs related to tender offers.

A summary of these updates is provided below, followed by the full text of the updated and new C&DIs, including links to markups showing revisions from the SEC.

RULE 145(A) C&DIS

Background

In business combination transactions involving target companies that have a majority stockholder, an acquiror often requests that such stockholder deliver a written consent immediately after the signing of the transaction agreement. This is known as a "sign-and-consent" structure, which has the advantage of eliminating the need to convene a stockholders meeting to approve the transaction. This accelerates the closing timeline and enhances the acquiror's deal certainty as the deal cannot be disrupted by another potential acquirer once the stockholder vote is obtained. Absent a written consent, acquirors will seek voting agreements by which management and principal security holders commit to vote in favor of the transaction at the stockholders meeting, referred to as "lock-up agreements."

In a 2008 C&DI, the SEC staff objected to sign-and-consent structures in transactions where the target stockholders were to receive stock consideration registered on a Form S-4. The staff's rationale was that offers to purchase target company stock by buyers and sales of such stock by large stockholders had been consummated privately via the "sign-and-consent" structure, and "once begun privately, the transaction must end privately," and thus the staff would object to the subsequent registration of stock on Form S-4.

Though the SEC staff had not formally updated its guidance, it had not recently enforced this portion of the C&DI, with several transactions occurring under the "sign-and-consent" and subsequent Form S-4 filing playbook with no objections from the SEC (review our practice note on "sign-and-consent" structures for more information).

Updated Guidance

In a significant departure from its 2008 guidance, the SEC updated the C&DI to align with its current practice of permitting subsequent registration of offers and sales of the acquiring company's securities on Form S-4 (or Form F-4) when a "sign-and-consent" structure has been implemented, provided: (1) the insiders of the target company, who provided written consents, are offered and sold acquiring company securities only in an offering validly exempt from the Securities Act, and (2) the registered securities (on either Form S-4 or F-4) are offered and sold only to security holders who did not sign on to such written consent.

This means that the SEC staff will allow stock-for-stock mergers to proceed with a combination of exempt offerings for target company insiders who executed consents in favor of the transaction and a registered offering for other target company stockholders.

Where lock-up agreements have been signed instead, there are four conditions that must be satisfied in order to ensure the non-objection of SEC staff to the registration of offers and sales:

- the lock-up agreement involves only "target company insiders" that are executive officers, directors, affiliates, founders and their family members, and holders of 5% or more of the voting equity securities of the target company;
- those signing the lock-up agreement own, in the aggregate, less than 100% of the target company's voting equity securities;
- votes are solicited from the target company's stockholders who have not signed lock-up agreements if such votes are required to approve the transaction under state or foreign law; and
- the acquiring company must deliver a prospectus to all target company security holders who are entitled to vote on the transaction.

This list of requirements builds on the pre-existing framework with key updates to the third element, clarifying that a vote is only required by the SEC if also required by state or foreign law and adding delivery of a prospectus as a new fourth requirement.

TENDER OFFER C&DIS

Background

The SEC expanded its Tender Offer Rules and Schedules guidance on March 6, 2025 with the release of five new C&DIs principally focused on clarifying the definition and treatment of material changes that may require disclosure.

New Guidance

Summaries of the new C&DIs are provided below:

- *Question 101.17*: The SEC acknowledges that its "general rule" requiring that all-cash tender offers remain open at least five business days following the initial disclosure date of material changes may not always be practical. In certain contexts, a shorter time frame may be acceptable, provided security holders have sufficient time to consider the material information disclosed when contemplating whether to tender, withdraw, sell or hold. The relative materiality of the information matters.

- *Question 101.18*: When an offeror announces a partly financed or unfinanced tender offer subject to Regulation 14D and discloses the lack of sufficient funds in its offer, the SEC considers the offeror's subsequent securing of funding as a material change to the previously disclosed information, requiring the offeror to promptly disclose this change and disseminate the updated disclosure to security holders. In some cases, offerors should consider extending the offer to allow shareholders adequate time to consider the change. This C&DI applies to both third-party tender offers and issuer tender offers.

- *Question 101.19*: The SEC clarifies that binding commitment letters from lenders constitutes a fully financed transaction. However, "highly confident" letters from lenders are not viewed with the same binding effect and are not considered fully financed.

- *Question 101.20*: Where an offeror has received a binding commitment letter from a lender but discloses that it may purchase the securities via an alternative funding source, if the offeror does utilize the alternative funding (including cash), the SEC does not consider the funding substitution a material change requiring disclosure. However, the offeror should still consider whether the offer materials should be updated to reflect the change.

- *Question 101.21*: This C&DI contemplates a situation in which there is an all-cash tender offer subject to Regulation 14D, where the offeror obtains a binding

commitment letter from a lender but conditions the purchase of the tendered shares on receiving the funds from the lender.

If the lender satisfies the contract and provides the funds, there is no disclosable material change.

If the lender does not meet its contractual obligation to fund, but the offeror waives the condition and utilizes alternative funding to purchase the tendered shares, the SEC does not consider this a material change.

Finally, if the lender does not fulfill its obligation, but the offeror waives the funding condition without any alternative funding source, the offeror's waiver would constitute a material change requiring prompt disclosure and dissemination to security holders. Further, offerors should also consider whether the prompt payment requirement imposed by Rule 14e-1(c), which requires that an offeror promptly pay for tendered securities or return them, is capable of being satisfied.

This C&DI applies to third-party tender offers as well as issuer tender offers subject to Rule 13e-4 and its comparable requirements (see, i.e., Rules 13e-4(c)(3), 13e-4(d)(2) and 13e-4(e)(3)).

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We are available to discuss these updates and other considerations related to sign-and-consent structures or materiality in tender offers. Please do not hesitate to contact us with any questions.

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NEW AND UPDATED C&DIS

239.13 An acquiring company may seek a commitment from management and principal security holders of a target company to vote in favor of a Rule 145(a) transaction, frequently referred to as a "lock-up agreement." The execution of a lock-up agreement may constitute an investment decision under the Securities Act. If so, the offer and sale of the acquiring company's securities would be made to persons who entered into those agreements before the Rule 145(a) transaction is presented to non-affiliated security holders for their vote.

Recognizing the legitimate business reasons for seeking lock-up agreements in the course of a Rule 145(a) transaction, the staff has not objected to the registration of offers and sales where lock-up agreements have been signed in the following circumstances:

- the lock-up agreements involve only executive officers, directors, affiliates, founders and their family members, and holders of 5% or more of the voting equity securities of the target company ("target company insiders");
- the persons signing the lock-up agreements collectively own less than 100% of the voting equity securities of the target company;
- 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 Rule 145(a) transaction under state or foreign law; and
- the acquiring company delivers a prospectus to all security holders of the target company entitled to vote on the Rule 145(a) transaction in accordance with its obligations under the Securities Act.

Where the target company insiders in the above circumstances deliver written consents approving the Rule 145(a) transaction before the Form S-4 (or Form F-4) is filed, the staff will not object to the subsequent registration of offers and sales of the acquiring company's securities on Form S-4 (or Form F-4) as long as:

- target company insiders who delivered the written consents will be offered and sold securities of the acquiring company 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 of the target company who did not deliver written consents approving the Rule 145(a) transaction.

[March 6, 2025] [Comparison to prior version]

225.10 An acquiring company may seek a commitment from management and principal security holders of a target company to vote in favor of a Rule 145(a) transaction, frequently referred to as a "lock-up agreement." The execution of a lock-up agreement may constitute an investment decision under the Securities Act. If so, the offer and sale of the acquiring company's securities would be made to persons who entered into those agreements before the Rule 145(a) transaction is presented to non-affiliated security holders for their vote.

Recognizing the legitimate business reasons for seeking lock-up agreements in the course of a Rule 145(a) transaction, the staff has not objected to the registration of offers and sales where lock-up agreements have been signed in the following circumstances:

- the lock-up agreements involve only executive officers, directors, affiliates, founders and their family members, and holders of 5% or more of the voting equity securities of the target company ("target company insiders");

- the persons signing the lock-up agreements collectively own less than 100% of the voting equity securities of the target company;

- 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 Rule 145(a) transaction under state or foreign law; and

- the acquiring company delivers a prospectus to all security holders of the target company entitled to vote on the Rule 145(a) transaction in accordance with its obligations under the Securities Act.

Where the target company insiders in the above circumstances deliver written consents approving the Rule 145(a) transaction before the Form S-4 (or Form F-4) is filed, the staff will not object to the subsequent registration of offers and sales of the acquiring company's securities on Form S-4 (or Form F-4) as long as:

- target company insiders who delivered the written consents will be offered and sold securities of the acquiring company 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 of the target company who did not deliver written consents approving the Rule 145(a) transaction.

[March 6, 2025] [Comparison to prior version]

Question 101.17

Question: Must an all-cash tender offer always remain open for at least five business days after disclosure of a material change?

Answer: No. The Commission has stated that "as a general rule," the offer should remain open for a minimum of five business days from the date that the material change is first disclosed. See Release No. 34-24296 (April 3, 1987). The Commission, however, has also acknowledged that it is impracticable to delineate every possible material change or the requisite time period attendant to that change. Accordingly, a shorter time period may be adequate if disclosure and dissemination of the material change allows security holders sufficient time to consider such information and factor it into their decision whether to tender shares, withdraw shares already tendered, sell into the market, or hold their shares. See Release No. 34-24296 (April 3, 1987); see also footnote 70 in Release No. 34-23421 (July 11, 1986) ("The minimum period during which an offer must remain open following material changes in the terms of the offer or information concerning the offer, other than a change in price or percentage of securities sought, will depend on the facts and circumstances, including the relative materiality of the terms or information").

[March 6, 2025]

Question 101.18

Question: An offeror commences an all-cash tender offer subject to Regulation 14D without sufficient funds or committed financing to purchase the maximum amount of securities sought in the offer (a "partly financed" or "unfinanced" tender offer). It discloses the lack of sufficient funds and committed financing in its offer to purchase. Would the subsequent securing of committed financing necessary to fund the purchase of all securities sought in the offer (a "fully financed" tender offer) constitute a material change to the previously disclosed information?

Answer: Yes. The staff views the securing of committed financing needed for the purchase of all securities sought in the tender offer as a material change. Accordingly, an offeror must:

- promptly disclose the change from an unfinanced tender offer to a fully financed tender offer in accordance with Rule 14d-6(c);

- promptly file an amendment to Schedule TO to report the material change in accordance with Rule 14d-3(b)(1); and

- promptly disseminate disclosure of the change to security holders in a manner reasonably designed to inform security holders of the change in accordance with Rule 14d-4(d)(1).

Because the change from an unfinanced (or partly financed) tender offer to a fully financed tender offer is viewed as a material change, the offeror must ensure that disclosure of the material change is disseminated with sufficient time for security holders to consider such information and factor it into the decision whether to tender shares, withdraw shares already tendered, sell into the market, or hold their shares. Accordingly, if the change from an unfinanced tender offer to a fully financed tender offer occurs near or at the end of the tender offer, the offeror must ensure sufficient time remains in the offer to allow for adequate dissemination, including by extending the offer if necessary.

This position equally applies to issuer tender offers subject to Rule 13e-4 and its comparable requirements (i.e., Rules 13e-4(c)(3), 13e-4(d)(2) and 13e-4(e)(3)).

[March 6, 2025]

Question 101.19

Question: Is a tender offer considered fully financed if the offeror has obtained a binding commitment letter from a lender to provide the funds necessary to purchase the maximum amount of securities sought in the offer?

Answer: Yes. 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. Accordingly, a tender offer is not considered fully financed if the offeror has only received a highly confident letter.

[March 6, 2025]

Question 101.20

Question: An offeror commences a cash tender offer for all securities of the subject class. At the time of commencement, the offeror discloses in its offer to purchase that it has obtained a binding commitment letter from a lender to provide the funds necessary to purchase the maximum amount of securities sought in the offer. The offeror also discloses the possibility that it may purchase the securities using alternative funding sources. Prior to expiration of the tender offer, the offeror decides to purchase the securities sought in the offer by using an alternative source of funds, such as its available cash or through committed financing provided by a different lender. The alternative funding source is sufficient to fund the purchase of all securities of the subject class. Would this type of change in the source of the funds constitute a material change?

Answer: No. The substitution of a funding source, or the substitution of available cash, is not considered a material change. The offeror should consider, however, 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.

[March 6, 2025]

Question 101.21

Question: An offeror commences an all-cash tender offer subject to Regulation 14D. The offeror discloses in its offer to purchase that it has obtained a binding commitment letter from a lender to provide the funds necessary to purchase all securities sought in the offer. Notwithstanding this binding commitment, the offeror conditions its purchase of the tendered securities on the actual receipt of the funds from the lender (a "funding condition") by the offer's expiration. Does the satisfaction or waiver of this funding condition constitute a material change?

Answer: When the offeror has a binding commitment letter from a lender and receives the expected funds, no material change in the information given to security holders has occurred because the lender has simply satisfied the funding condition by fulfilling its contractual obligation.

If the lender does not fulfill its contractual obligation by providing the expected funds, but the offeror waives the funding condition because it is able to use an alternative source of funds to purchase all securities sought in the offer, then, consistent with Question 101.20, no material change has occurred.

If the lender does not fulfill its contractual obligation by providing the expected funds, but the offeror waives the funding condition despite having no alternative funding

source to purchase all securities, then the waiver would constitute a material change, requiring the offeror to:

- promptly disclose the material change in accordance with Rule 14d-6(c);
- promptly file an amendment to Schedule TO to report the material change in accordance with Rule 14d-3(b)(1); and
- promptly disseminate disclosure of the change to security holders in a manner reasonably designed to inform security holders of the change in accordance with Rule 14d-4(d)(1).

Further, the waiver of the funding condition and the lack of funding could implicate other tender offer provisions, such as the prompt payment requirement in Rule 14e-1(c) as well as the provisions of Section 14(e).

This position equally applies to issuer tender offers subject to Rule 13e-4 and its comparable requirements (i.e., Rules 13e-4(c)(3), 13e-4(d)(2) and 13e-4(e)(3)).

[March 6, 2025]