

LOCK-UP AGREEMENTS

At the time of an Initial Public Offering (“IPO”), or of a secondary market placing, investor(s) with significant shareholdings frequently enter into an agreement (a “Lock-Up Agreement”) with the investment bank(s) leading the IPO or placing, under which the shareholder(s) undertake(s) not to sell further shares for a given period, except in certain circumstances. In some cases, these circumstances are specified, but, more generally, Lock-up Agreements are subject to waiver by the investment bank(s) in its sole discretion.

Lock-Up Agreements have a significant market function. In particular, they are important to investors as they regulate the supply of shares in the relevant company and so are relevant to price formation. Investors are therefore intended to – and do – place significant reliance on them.

In recent years, market practice in relation to Lock-Up Agreements has evolved so that, increasingly, they are waived by the bank in whose favour they are given before the stated expiry date, in some cases a long time before. ABI members consider this development unwelcome.

Many vendors and investment banks, however, believe that it is important to retain a degree of flexibility around the ability to waive a Lock-Up, both to minimise potential risks of distortion to trading patterns in the run-up to a fixed expiry date of a Lock-Up Agreement and to be able to take advantage of situations when it is in everybody’s interest for a Lock-Up to be waived and so for an overhang to be brought forward and placed successfully.

Against this background, ABI members recommend the following best-practice approach in relation to Lock-Up Agreements:

- Both the period of the Lock-Up, and the circumstances in which any sale might take place prior to its expiry (and, in particular the extent to which any period of the Lock-Up is “soft” i.e. to which it may be broken at the sole discretion of the investment bank) should be clearly disclosed.
- The appropriate period for, and terms of, a Lock-Up Agreement will be a matter for the relevant vendor(s) and investment bank(s) in the particular circumstances in question. However, in general:
 - “ Soft” Lock-Ups i.e. which may be broken at any time at the sole discretion of the investment bank are only appropriate for periods of relatively short duration
 - Where Lock-Ups of a longer duration are entered into, it is appropriate for the Lock-Up Agreement to specify an initial period of “hard” Lock-Up i.e. in which a sale may not take place at all (or only in very limited, objectively definable circumstances)
 - Where or to the extent that a Lock-Up may be waived at the sole discretion of (an) investment bank(s), any such waiver should only be given after careful consideration, taking full account of the overall merits from investors’ perspective and of the need to maintain market integrity. In this context, investors expect that any such waiver would generally only be granted at a time close to the stated expiry date of the Lock-Up Agreement.

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