

Item 4(c) Tip Sheet (Nov. 28, 2016)

Item 4(c) Studies, Surveys, Analyses and Reports

Item 4(c) requires parties to include “all studies, surveys, analyses and reports which were prepared by or for any officer(s) or director(s) (or, in the case of unincorporated entities, individuals exercising similar functions) for the purpose of evaluating or analyzing the acquisition with respect to market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets.” These documents help the FTC and the Antitrust Division of the DOJ understand the competitive impact of a transaction.

Responding to Item 4(c) can be confusing for filers because the item’s broad language is subject to a range of interpretations. Documents that are not in fact responsive to Item 4(c) are commonly included by filing parties, and occasionally responsive documents are overlooked. This guidance should help parties determine with documents should be submitted.

The documents discussed below should not be considered an exhaustive list of materials potentially responsive to Item 4(c).

Documents capturing internal and shared analyses

When evaluating a potential acquisition, a buyer frequently will create internal documents that discuss the pros and cons of making the acquisition. Typical examples of these kinds of documents are Investment Committee Memoranda and Board Presentations. These documents often discuss the rationale for the transaction, such as how well the target will fit into the buyer’s current business operations. This type of analysis is considered responsive to Item 4(c) and these documents must be produced, assuming the other criteria are met.

Item 4(c) also contemplates receiving presentations made by the parties to the transaction, such as management presentations. These kinds of presentation documents may be responsive if the 4(c) criteria are met.

Ordinary course documents

Two questions frequently arise about ordinary course documents. The first is whether a party’s ordinary course document can become a 4(c) document for that party. The second is whether one party’s ordinary course document can become a 4(c) document for the other party.

The general rule is that a document drafted in the ordinary course remains an ordinary course document regardless of what purpose it may be used for subsequently. For instance, if a company creates an overview of competitors as a part of that company’s quarterly review of the status of its business, that document does not become a 4(c) document even if it is later

Email

The following guidance applies to the submission of email:

- If an email contains 4(c) content, assuming the other criteria are met, it is responsive to Item 4(c) along with any attachments to that email regardless of whether the attachments contain 4(c) content.
- If an email contains no 4(c) content, but one of its attachments does, that attachment should be included as a separate 4(c) submission, assuming that it meets the other criteria.
- If an email contains 4(c) content and meets the other criteria, it is responsive to Item 4(c) along with any attachments to that email regardless of whether the attachments contain 4(c) content.

The following documents are not responsive to Item 4(c):

Documents associated with the public announcement of the transaction

When a transaction involves a public company, there is often a package of materials associated with the announcement of the transaction, such as a press release, an investor presentation, a transcript of the investor conference call, a conference call script, and other scripts relating to the announcement to customers, suppliers, competitors, etc. These publicly-available materials are not created in order to evaluate or analyze the transaction, but are instead created much later, when the transaction is set to move forward after public announcement.

Draft documents