Compliance with items 4(c) and 4(d) of the Hart-Scott-Rodino Antitrust Improvements Act

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The Hart-Scott-Rodino Antitrust Improvements Act of 1976 (HSR Act) requires that certain proposed acquisitions of voting securities, noncorporate interests, or assets be reported to the Federal Trade Commission (FTC) and the Antitrust Division of the Department of Justice (DOJ) prior to consummation.[1] The parties must then wait a specified period, usually 30 days (15 days in the case of a cash tender offer or bankruptcy sale), before they may complete the transaction.

Whether a particular acquisition is subject to the requirements of the HSR Act depends on the value of the acquisition and, in certain acquisitions, the size of the parties as measured by their sales and assets. At present, any transaction valued above $899.8 million is reportable. In addition, transactions valued between $90 million and $899.8 million may also be reportable if an acquiring party with assets or annual net sales at or above $180 million is making an acquisition from a party not engaged in manufacturing that has total assets at or above $18 million. Thresholds are updated annually and can be found on the FTC's website (https://bit.ly/2pIzpxP).[2]

Compliance with the HSR Act is expensive. In addition to the cost of collecting the required materials and otherwise fulfilling the reporting obligations, the current filing fees stand at:

- $45,000 for transactions valued between $90 million but less than $180 million;
- $125,000 for transactions valued at $180 million but less than $899.8 million; and
- $280,000 for transactions valued at $899.8 million or greater.[3]

The fine for failing to comply with the HSR Act is currently $42,530 per day of noncompliance. Although initial offenses may not result in a monetary penalty, repeat and egregious offenders have received fines in the millions of dollars.

The Notification and Report form

Transactions are reported to the FTC and DOJ through the use of a Notification and Report form (the form). The form seeks eight categories or items of information from the ultimate parent of each (or all) of the transacting parties.[4] The "ultimate parent" is defined as an entity that is not controlled by any other entity. The eight categories include detailed financial information, geographic locations of all operations of the transacting parties, and the identification of geographic and service overlaps between the parties. A copy of the form and instructions can be found at https://bit.ly/2Bz6Mpu.[5]

All of the requested information is important, but the item that garners the most interest from the enforcement agencies, and the one that requires the greatest effort to comply with in terms of both time and resources, is Item 4, and more specifically Items 4(c) and 4(d) —also referred to as 4(c) and 4(d) documents. These documents help the FTC and DOJ understand the competitive impact of the acquisition.

Under the HSR Act requirements, 4(c) documents include "all studies, surveys, analyses and reports 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." Similarly, 4(d) documents include "all studies, surveys, analyses, and reports prepared by investment bankers, consultants, or other third party advisors 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 market shares, competition, competitors, markets, potential for sales growth or expansion into product or geographic markets that specifically relate" to the acquisition.

Compliance with the technical requirements of Items 4(c) and 4(d) necessitates an understanding, as explained below, of the following: (1) what types of documents might be responsive, (2) who might have responsive documents, and (3) what was created for "the purpose of evaluating or analyzing the acquisition."

Importantly, a failure to fully comply with Item 4 is tantamount to a failure to comply with the HSR Act and can result in significant fines.

Documents that might be responsive to Item 4(c)

Reference to "all studies, surveys, analyses and reports" can, and should, be interpreted very broadly. The FTC Premerger Notification Office (the PNO) sets forth the following examples of potentially responsive types of documents:

- Board presentations and management presentations;
- Overhead slides or PowerPoint documents used in presentations;

- Email messages;
- Transcribed recordings of presentations or meetings (but not audio recordings that have not been transcribed);
- Handwritten notes, including those on index cards or the back of an envelope;
- A spreadsheet showing how market shares may be impacted by the transaction;
- A map with different colors representing the regions covered by different competitors; and
- Bullet points explaining the competitive benefits the acquisition will provide.[6]

In trying to identify which documents might meet the requirements of Item 4, there are a few issues that frequently arise, namely: (1) how to treat ordinary course documents, (2) which emails might be responsive, and (3) what to do with drafts of documents. The PNO provides a Tip Sheet addressing, among other things, where 4(c) documents can be found.[7]

Ordinary course documents

A frequently asked question is whether an ordinary course document would qualify as a 4(c) document. According to the FTC:

> 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 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 consulted by an officer at the company in determining whether to move forward on a potential acquisition opportunity.[8]

In other words, the determination depends on the context in which the document was originally drafted and does not change thereafter.

Not surprisingly, however, there are a few exceptions. First, a document that is created in the ordinary course but subsequently attached or incorporated into a document that might otherwise qualify as a 4(c) document, then becomes part of the 4(c) document and must be produced.

Second, if board meeting minutes, although arguably created in the ordinary course, otherwise qualify as a 4(c) document, they must be produced. These documents are deemed to embody the decision-making process of the board.

Third, the PNO has taken the aggressive (and somewhat controversial) view that a

document that is created in the ordinary course by one of the transacting parties may become a 4(c) document if it ends up in the hands of the other transacting party and is used by that party to assess the acquisition. The example given by the PNO is the use of a shared data room containing ordinary course documents created by the seller, and the documents are subsequently downloaded by the buyer for use in considering the acquisition.

Emails

Identifying responsive emails is particularly troublesome and burdensome. The PNO provides the following guidelines:

- Emails that contain 4(c) content, and otherwise fit the criteria, are responsive along with all attachments to the email, even if the attachments do not contain 4(c) content.
- If an attachment to an email contains 4(c) content, but the email does not, the attachment should be separately produced.
- Email replies that do not contain 4(c) content are not considered responsive.
- However, if an email reply contains 4(c) content, then the original email to which it replies must also be produced, even if that original email does not contain 4(c) content.

Draft documents

The PNO takes the position that if there is no final version of a document that is otherwise responsive, the latest draft must be submitted. Also, if there is a final version, then no drafts need be submitted unless the draft went to the board for review. In other words, the PNO considers that all documents that went to the board for review are potentially responsive, even if a later final version is being submitted with the form.

Who might have responsive documents

Understanding who might qualify as an "officer" or "director," particularly for unincorporated entities, is not always straightforward. The PNO has indicated that "officers" are limited to (1) those persons whose positions are designated by the bylaws or articles of incorporation of the [ultimate parent] of the filing party or of any entity under its HSR control; or (2) those persons appointed by the board of directors of the [ultimate parent] of the filing party or of any entity under its control, or individuals designated in a similar way by an unincorporated entity."[9] Individuals who are not officers or directors when they receive or create documents are generally not to be included unless it is known that they will become an officer or director of a newly formed acquiring entity.

If there are no officers or directors of the company, then the filing parties:

> must look to those individuals whose capacity and duties include deciding whether to make the acquisition or sale of the business. For example, if a newly formed company funded by investors has no employees, officers, or directors, and if there is an investment committee at the LLC taking on the role of making decisions regarding the acquisition or sale of a business, the investment committee should be treated as officers and directors for the purposes of searching for relevant documents….

What was created to evaluate or analyze the acquisition

The PNO provides several scenarios that illustrate when a document is created for the purpose of evaluating or analyzing the acquisition. These include:

1. When the assets are being auctioned, and the seller entertains several bidders and prepares separate evaluation of each bidder's proposal, only the evaluation of the winning bidder is responsive unless there is only one document that evaluates all of the bidders.

2. When a portion of the transaction is exempt from HSR filing requirements, documents relating exclusively to the exempt portion of the transaction are not responsive. However, documents that analyze both the exempt and nonexempt portions of the transactions and otherwise meet the criteria must be produced.

3. For acquisitions that are conducted in stages, where one of the stages is not reportable, documents related to the nonreportable stage are not responsive.

4. Where there have been multiple rounds of discussions over an extended period of time and there has been a "clean break" with some time period during which the transaction was "dead" (i.e., more than a mere cooling off period), then only documents from the most recent discussions are potentially responsive to Item 4(c). To rely upon the "clean break" rule, the party must have stopped actively considering the transaction.[10]

Documents that might be responsive to Item 4(d)

The types of documents that will be responsive to Item 4(d) of the form are very similar to those responsive to Item 4(c). However, Item 4(d) is looking for documents that were created by third-party advisors to the parties to the transactions. As with 4(c) documents, 4(d) documents must have been created for an officer or director. In addition, some of the unique specifics of Item 4(d) documents are discussed below.

Confidential information memoranda

Item 4(d)(i) requires that the parties provide any confidential information memoranda (CIM)

that were prepared "specifically relate[d] to the sale of the acquired entity(s) or assets."[11] A CIM only needs to be provided if it was prepared within the last year, but there are some exceptions to that general rule. For example, if the CIM was prepared for a potential transaction, the transaction was abandoned, but the CIM was then used for a resurrected potential transaction, the CIM must be provided. If a seller prepared multiple CIMs, it only needs to submit the CIM prepared for the actual buyer. However, if the CIM is never provided to a buyer, the CIM still needs to be submitted. In addition, if there is no formal CIM, Item 4(d)(i) requires the parties to submit any documents that are the functional equivalent of a CIM, to the extent they were provided to the buyer. In general (with the exception noted above) Item 4(d)(i) documents need only be provided if they were prepared one year or less before the date of filing. However, an Item 4(d)(i) document could also be responsive to Item 4(c). In that case, the document would need to be provided with 4(c) documents, as Item 4(c) documents do not have a time limit.

Studies and analyses of the market

Item 4(d)(ii) mimics the requirements of Item 4(c), except that it relates to documents prepared for officers and directors of the parties by third-party advisors. As above, these documents only need to be provided if they were prepared one year or less before the date of the filing. However, also as above, if a 4(d)(ii) document is also responsive to Item 4(c), the one-year time limitation would not apply.

Efficiency studies

Item 4(d)(iii) requires the parties to submit any studies that demonstrate or evaluate the efficiencies or synergies of the transaction. However, any analysis without quantified dollar amounts is not responsive, nor is any analysis with a quantified dollar amount that does not also include the assumptions on which that amount is based. As for all Item 4 documents, the definition of document is quite broad, so an Item 4(d)(iii) document may be a series of emails, unless those emails were used to create a final "substantive" document.

Conclusion

Compliance with the HSR Act takes time, attention, and resources. As described above, compliance with Item 4 of the Notification and Report form is particularly burdensome. Advance knowledge of the requirements of this item will greatly assist parties to a reportable transaction. The form and instructions help the parties understand how to identify and locate potentially responsive documents and gain a better understanding of how this information is used by the federal enforcement agencies during the merger review process.

Takeaways

- Compliance with the HSR Act takes time and preparation.
- A failure to fully comply with the HSR Act can be costly.
- The definition of 4(c) and 4(d) documents incorporates a wide range of information.
- Understanding what types of documents qualify as responsive to 4(c) and 4(d), and who might possess such documents, are key to successful compliance.
- The Premerger Notification Office and materials provided by the PNO are invaluable resources.

115 U.S.C. § 18a.
2 "Current Thresholds," Premerger Notification Program, Federal Trade Commission (FTC), accessed October 10, 2019, https://bit.ly/2pIzpxP.
3 "Filing Fee Information," Premerger Notification Program, FTC, accessed October 10, 2019, https://bit.ly/2Lf4kqP.
416 C.F.R. § 801.1 (a)(3).
516 C.F.R. § 803.
6 American Bar Association (ABA), *Premerger Notification Practice Manual: Fifth Edition* (ABA Book Publishing 2015), 304.
7 "HSR Resources," Premerger Notification Program, FTC, accessed October 10, 2019, https://bit.ly/2pIHrXv.
8 "HSR Resources," Premerger Notification Program.
9 ABA, *Premerger Notification Practice Manual,* 306–307.
10 ABA, *Premerger Notification Practice Manual,* 308–311.
1116 C.F.R. § 801.1 (a)(3).